PUBLIC INTEREST ADVOCACY IN CANADA

POLICY, PROGRAMS
AND RESEARCH BRANCH
RESEARCH AND
STATISTICS SECTION

Canada

85-5858/

PUBLIC INTEREST ADVOCACY IN CANADA

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September, 1984

Research Project prepared for the Research and Statistics Section, Department of Justice, Canada.

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ACKNOWLEDGEMENTS

A number of individuals at the Department of Justice have provided me with direction and insight throughout the course of this study. In particular, I would like to express my appreciation to Ab Currie. who helped refine the terms of reference for the research and reviewed my initial drafts, Glen Rivard and Susan Campbell, who commented on the legal services aspect of this study and Pat Begin, who helped me with the difficult task of combining the the three separate components of this review into one paper.

I would also like to acknowledge the research assistance provided by Gerry Thorne regarding advocacy conducted in the United States and the activities of legal service organizations in Canada.

Finally, I would like to thank the people who gave freely of their time to discuss with me their perpspective on public interest advocacy. Over the course of the study, I met with the following individuals:

David Baker, Executive Director of Ontario's Advocacy Resource Centre for the Handicapped

Wendy Baker, Volunteer Lawyer with British Columbians for Mentally Handicapped People

Dick Gathercole, Executive Director of the B.C. Public Interest Advocacy Centre

Gerald Green. Staff Lawyer, Mental Patients' Advocacy Project

Marilyn Kansky, Executive Director of West Coast Environmental Law Association

David Mossup and Allan MacLean, Legal Director and Staff Lawyer, respectively, at the Vancouver Community Legal Assistance Society

Grace Patterson and Toby Vigod, Clinic Director and Counsel, respectively, at the Canadian Environmental Law Association

Arne Peltz, Director, Manitoba Public Interest Department

Bryan Ralph. former Executive Director of the B. C. Legal Services Society and current Director of the Legal Clinic at the Law School. University of British Columbia

Reg Robson and John Russell, President. Board of Directors and Executive Assistant, respectively, of the B.C. Civil Liberties Association

Andrew Roman, Executive Director of the Public Interest Advocacy Centre in Ontario

John Swaigen, former Executive Director of the Canadian Environmental Law Association and currently a staff lawyer with the Ontario Ministry of Environment

INTRODUCTION

The terms of reference for this study were first developed in the spring of 1983, by Ab Currie, Senior Research and Evaluation Officer, department of Social Matters, Evaluation and Statistics at the Department of Justice.

The research plan was divided into three phases, as follows:

Part I: This phase involved a review of concepts and definitions relevant to the study as well as an historical analysis of public interest advocacy in Canada and the United States.

Part II: This phase of the research focussed on current public interest issues, considering the range of organizations which promoted these issues and the manner in which they undertook advocacy.

Part III: The final portion of the study focussed on delivery and funding of public interest advocacy. In particular, the methods of providing advocacy services, the various approaches used by legal advocates and public reaction to increased advocacy were considered.

The research methods in each portion of the study varied considerably. Part I primarily involved a literature review. Although the majority of publications relating to public interest advocacy are American in origin, there are also some useful Canadian sources (see the Bibliography for a compendium of the documents reviewed).

By contrast, there was little information that has been produced in Canada about the questions raised in Part II. As a result, this analysis was based largely on conversations with those who could be considered to be public interest advocates, as well as a 3 month sample of media coverage in this area.

In Part III, I again relied heavily on interviews with those in the field to obtain an overview of public interest advocacy in Canada. This information was supplemented with annual reports and other documentation from the various public interest law firms, legal service clinics and organizations which are involved in providing these services.

Following an initial review by Ab Currie and Pat Begin of the information that was produced, the three parts of this study were amalgamated into the document which follows.

EXECUTIVE SUMMARY

The profile of public policy issues has been far greater in Canada over the last decade than during any other period in our history. Court actions resulting in the Morgenthaler, Borowski and Justin Clark decisions, regulatory hearings such as CRTC licencing of pay-TV and law reform activities around such issues as pornography and the creation of a civilian secret service are some of the many examples of increased public debate about the manner in which our society is regulated. In all of these activities, public interest advocates have played an important role.

Public interest advocacy is a term which probably did not exist before the mid-1960's. At that time, a new vocabulary had to be developed to describe the changes regarding public involvement in policy-making that were occurring. Organizations such as consumer and environmental groups, which publicly promoted non-economic points of view previously receiving little consideration in the political process were described as public interest groups. The lawyers which represented these groups as well as others excluded from the decision-making process became known as public interest advocates. The activities which these advocates undertook on behalf of their clients was considered to be public interest advocacy.

Public interest advocacy was undertaken in the United States well before it was described in this way. For example, both the American Civil Liberties Union and the Education and Legal Defence Fund of the National Association for the Advancement of Colored People (NAACP/LEDF) have used attorneys to promote law reform since the 1930's. These lawyers, who acted for clients where political change was the objective and where the point of view represented had generally been excluded from the policy process, can also be considered to be public interest advocates.

Prior to the mid-1960's, public interest advocacy was undertaken largely by interest groups such as the NAACP and ACLU which used staff lawyers as well as a network of volunteer lawyers to accomplish the goals of their respective memberships. Over the last two decades, funding in the United States through the federal government and private foundations as well as the development of community and public interest organizations have allowed a "second wave" of advocacy to expand into the full spectrum of public interest issues.

Neither the new wave nor the civil rights type of advocate has played an important role in Canada until recently. Several factors account for this difference:

- community and public interest organizations. which were the impetus for public interest advocacy in the U.S., did not become well-organized until the late 1960's and early '70's and did not consider advocacy to be an important component of their activities until the last decade

- no document comparable to the American consititution, which allowed U.S. Courts to actively protect individual rights, existed in Canada until the recent passage of the Charter

- Private foundations and the Federal Government in the United States have specifically set public interest advocacy as a goal, allowing the development of public interest law firms and legal aid organizations which promoted law reform, respectively

- the courts are less accessible to group actions in Canada because of more narrow rules of standing. including the situations in which class actions can be brought

Nevertheless. advocacy in this country has developed over the last decade and a half in three main areas. Firstly, public interest organizations have taken steps to gain direct access to lawyers, either by creating panels of volunteers, or. in some cases, hiring staff counsel. The latter has generally been made possible by funding from the Federal Government.

Secondly, public interest law firms have been formed to conduct advocacy in the consumer and environmental areas. In particular, three public interest advocacy centres and as many environmental law centres operate primarily with federal funding and financial assistance from provincial law foundations.

Finally, a few provincial governments have attempted to extend their legal aid programs by establishing specialized clinics, which include a public interest advocacy component. In Ontario, a network of community clinics has been established for the disabled, tenants. and children, as well as for environmental groups through the Canadian Environmental Law Association. Manitoba has created a Public Interest Department for the sole purpose of conducting law reform and advocacy on behalf of the disadvantaged. B.C. has developed legal service offices to handle the legal problems of native people and prisoners.

In large part. however, provincial legal aid involves a combination of referrals to the private bar (judicare) and the delivery of legal services through staff lawyers (legal services). While the latter offers more opportunity for public interest advocacy in theory, both models are unable to meet more than the immediate needs of the disadvantaged. This is because limited resources result in a heavy caseload. with little or no opportunity to specialize in a particular area or to conduct the research necessary for effective law reform.

In recent years, the Federal Department of Justice has directly funded such programs as the Mental Patients' Advocate Project, the Farmworkers' Legal Services Project, Manitoba's Public Interest Department and Ontario's Advocacy Resource Centre for the Handicapped. All of these programs have provided an effective and cost-efficient method of meeting the legal needs of a specific disadvantaged community, by combining direct legal services with law reform, test litigation and education.

In order to move towards the goal of equal access to legal services, there is a need for far more public interest advocacy-type services to be provided to the disadvantaged. In one review of community and public interest groups in Canada, over 75% of existing organizations were formed in the last decade. A survey of such groups found that a large percentage were unable to obtain the legal assistance they required. A Public Inquiry into the access to legal services by the disabled found that despite a number of organizations which had developed in Ontario to provide these specialized services, "delivery systems for legal services remain dangerously partial and fragmented".

There are also a number of other advantages which have been cited to justify increased support for programs which allow public interest advocacy to be conducted. They include:

- A better-informed decision can be made because all interests have an opportunity to participate more equally in the process
- It provides a cost-effective method of bridging the gap between the goal of equal access to justice and the actual level of service provided by the provincial governments
- Protection of individual rights and freedoms is better ensured
- Group legal services through public interest advocacy can reduce the caseload of legal aid offices

Based on existing experience. it is unlikely that an increase in the level of these services would cause a reduction in public support for public interest advocacy. Most advocates have observed a favourable public response to their activities. as well as from regulators and regulatees where administrative tribunals are involved. However, some backlash may be expected from the targets of such activities, depending on the extent to which their interests are affected.

CHAPTER I

WHAT IS PUBLIC INTEREST ADVOCACY?

We have come to associate public interest advocacy with lawyers such as Ralph Nader defending consumer rights or with environmental groups intervening in public hearings. It is activities such as these which have brought this kind of advocacy to public view and perhaps to public acceptance. However, public interest-type advocacy was carried out well before the 1960's -- at least in the United States -- and includes representation of a wide range of interests, well beyond consumer and environmental concerns.

Nevertheless, it is no accident that the term public interest advocacy was not part of our vocabulary until two decades ago. At that time, public policy-making in both Canada and the U. S. as well as general expectations about the way governments do business began to alter. As the decisions to be made became more varied and complex, politicians relied increasingly on regulatory agencies and a bureaucracy to provide them with advice and to make decisions. As well, opportunities for public comment or involvement in decision-making were expanded. Governments began to use a variety of tools including public inquiries, parliamentary committees and public and regulatory hearings, to seek public opinion. It is in this atmosphere of increased openness and decentralized decision-making, that a wide range of interest groups first began to participate in policy decisions which affected them.

It has been necessary to develop new terms to describe the change in the political process that has occurred. As new interests promoting non-economic points of view appeared at public forums, they were labelled public interest organizations. Lawyers who were promoting interests that had traditionally been un- or under-represented in policy-making were labelled public interest advocates.

In the following Chapter, I briefly describe the major changes which have occurred in our political system and discuss the role that public interest organizations and public interest advocates now play in the decision-making process.

A. The Change in Policy-Making

The manner in which decisions are made by government depends very much on the issue being considered and the element of public policy which is involved. Nevertheless, some general conclusions can be drawn about the changes which have occurred in the decision-making process over the last two to three decades.

First of all, the election, which until recently was the primary method of public consultation, is no longer seen as the only acceptable forum for debating policy questions. This has been recognized by political leaders who have actually campaigned on a platform of public participation in decision-making. For example, one prominent politician stated in a recent federal election that:

> In every area, there is not a lack of willingness on the part of individuals and citizens' groups to participate and whether we like it or not, such participation is an irreversible fact in modern societies. And the only choice facing governments at all levels is whether to invite such participation at every stage of the decision-making process, in an atmosphere of co-operation, or whether to encounter participation after the fact, in an atmosphere of hostility. It is really no choice at all.[1]

In the space of less than 20 years, the techniques used by government to surface public debate between elections has rapidly evolved. The public has come to expect white and green papers, parliamentary committees, creation of task forces, the establishment of public inquiries, etc., whenever important policy decisions are to be made.

Secondly, there has been an increased tendency to view government as an arbiter of interests whose duty it is to arrive at a fair and nonpartisan decision after receiving input from those who would be affected.[2] Some writers have suggested that this approach involves a determination of the public interest.[3] For example, in a study conducted for the Law Reform Commission of Canada on public participation in the administrative process, David Fox stated that:

> most, if not all governmental activities are meant to be conducted "in the public interest"; the phrase abounds in statutes, regulations and rules for practices and procedures.[4]

In practical terms, the public interest then becomes whatever the policy-maker says it is. The extent to which it truly reflects a reconciliation of the various interests involved will depend on such factors as the predisposition of the decision-maker and the opportunities for input.

The change in perceptions regarding the role of government has created pressure on those making decisions to hear from the various interests involved and to make some assurances for more equal access to the process. For example, expenses are often paid for non-profit organizations appearing before parliamentary committees. legal counsel have been appointed and funding made available in public inquiries and citizen groups are often directly consulted on important public policy issues. However, it is not difficult to identify situations where economic interests are able to compete far more effectively for the attention of a policy-maker, than the less advantaged or non-economic interests which are involved.

As well. there is a great deal of variability in the way that governments across Canada have responded to changing expectations regarding the way in which public policy decisions are made. In some jurisdictions, public hearings are commonplace while in others, only those who have direct access to politicians through lobbying will generally take part in the process.

One area where significant development has occurred over the last twenty years is in the regulatory arena. Tribunals such as the National Energy Board are required to hold public hearings where policy decisions are being made or where the regulated industry provides a public service. In addition, they are often required by statute to make a determination of what is in the public convenience and necessity, or apply some other "public interest" type test.

In summary, the political system in Canada has evolved significantly in the past two decades to provide scope for participation of interests which previously were excluded or at least not considered relevant to policy-making. The extent to which the actual decisions made now more fairly reflect all the interests affected is much more difficult to assess and will be discussed in some detail later in this report.

B. Public Interest Organizations

Public interest was not used as a means of describing either advocacy or organizations until the mid-60's. At that time, the growth and wide-spread support of new organizations promoting environmental, consumer and other concerns as well as media documentation of this phenomenon caused changes in the way most people in the U.S. and Canada viewed involvement in the political system. In particular, the use of such tactics as lobbying. petitions, presentation of briefs, became widely accepted.

The active involvement of citizen organizations in the political process also changed the way in which society itself was defined. Sociologists began to view the interplay of interest groups as an important if not dominant aspect of public policy-making. Robert Presthus, a Canadian political scientist, described these groups as "collectivities organized around an explicit value on behalf of which essentially political demands are made vis-a-vis government, other groups and the general public "[6] Groups that promoted certain positions or attitudes came to be labelled as public interest organizations.

For example, Thomas Berger, who was the Commissioner in the federal Mackenzie Valley Pipeline Inquiry. has discussed the involvement of public interest organzations in the inquiry process:

> These groups are sometimes called public interest groups. I suppose that is because they represent interests that the public believes ought to be considered before a decision is made. They represent identifiable interests that should not be ignored. that indeed. it is essential should be heard. They do not represent the public interest, but it is in the public interest that they should participate in the inquiry.[7]

Russ Anthony, Commission counsel in the Thompson West Coast Oil Ports Inquiry, echoed Berger's comments several years later:

> ... In major issues there are, in fact, a number of public interests. Each one has a purpose and vitality that requires individual expression. Of course, not everyone can be allowed to participate in the process unrestrained. Participation demands knowledge gained through experience and research. For that reason, groups of individuals and coalitions of interests have been encouraged. That is the reason also that the inquiry utilized substantial portions of its budget allotment for the funding of participants.[8]

It is interesting to note that neither writer accepts that a group must put forward a position which reflects the common good or some equivalent to be considered a public interest organization (it is unlikely that the position or policies of any single individual or organization could ever meet this test. in any event). Rather, it is their view that the organizations which fall into this category are those which represent points of view which the public feels should be involved in the process but which are not automatically included.

Apart from their involvement in the political process, what then distinguishes public interest organizations from other "collectivities" in society?

One feature is that the interest being promoted is not a strictly economic one. In his article on the Consumers Association of Canada. Jonah Goldstein defined public interest groups as "organizations which seek to promote particular social or political policies in the name of some general good."[9] From the perspective of the regulatory process. Lazarus and Onek describe public interest representatives as those advocating "important, but not necessarily correct points of view which do not have the sponsorship of industry or other well-organized constituency and which as a result are not frequently represented in the regulatory process."[10] What these two methods of defining public interest organizations have in common is that the membership of these groups are not motivated by any direct economic benefits.

It is this aspect of public interest organizations which distinguishes them from professional organizations- which although they may be non-profit, are concerned primarily with protecting the interests of their membership. It also sets them apart from other community groups such as tenants associations, which have been formed to promote the concerns of a certain sector of society.

From the perspective of this study, however, public interest groups share one important characteristic with other organizations which have a community based membership -- the interests they are promoting were largely unrepresented in the decision-making process much earlier than the mid-60's. With the exception of civil liberties organizations. very few public interest-type organizations existed earlier than two decades ago and those that did were generally not involved in the political process.

Public interest organizations can therefore be described as those interests in the policy-making arena which promote non-economic concerns and which were largely unrepresented before the changes in the political process and in general attitudes towards public involvement in policy-making which occurred in the 1960's and 70's.

B. Public Interest Advocacy

Public interest advocates are not simply lawyers who represent public interest organizations, as the term would suggest. Rather, the expression has been used in an attempt to describe the use of lawyers by a broad range of interests which prior to the 1960's had limited or no access to either the legal or the political system. As Robert Rabin comments in "Lawyers for Social Change":

> the sole common denominator that can be applied to the spectrum of public interest law activities is the articulation of perspectives on a wide range of problems that previously were given much less, if any, formal consideration by governmental decision-makers[11]

As is suggested from the above, the clients of such advocates do not necessarily represent the public interest; rather, it is in the public interest that those who were formerly excluded from policy-making be granted an opportunity to participate.

Another important aspect of public interest advocacy is that it is considered to be a necessary supplement to the kinds of services which are provided by legal aid offices. According to a Note in the Yale Law Journal:

> The term "public interest" law was first applied in the mid-60's to the work of legal groups making efforts to secure legal services for those unable to obtain them through normal channels.[12]

By promoting law reform and acting for large numbers of people, public interest advocates were able to contribute important legal services to those who couldn't afford them, but who were unable to obtain these services through traditional legal aid offices.

Public interest advocacy can therefore be considered to include the representation of a wide range of individuals and groups, including:

- public interest groups
- organizations promoting the interests of their membership, where that membership has traditionally had little participation or power in the public policy-making process
- individuals whose particular legal concern is representative of a public policy perspective which has not received articulation in the political process

CHAPTER II

PUBLIC INTEREST ADVOCACY IN THE UNITED STATES

Public interest advocates have played an important role in shaping American law and public policy for more than half a century. This contrasts sharply with Canada where advocacy is a relatively recent phenomenon.

This chapter's description of American advocacy suggest that there are both legal and socio-political factors which account for the differences between the two countries. On the legal side, the U.S. courts have been far more available to public interest advocates because of the existence of a Constitution which protects individual freedoms and more recently through the liberalization of the rules relating to standing. (For a more detailed discussion of the differences between the American and Canadian legal system as they relate to advocacy, please see Appendix I.)

There has also been far greater support for advocacy at all levels of American society. Legal services, which are provided in large part by the Federal Government, have focussed on law reform rather than on traditional legal aid for individuals. Private foundations have funded a wide range of public interest law firms. The voluntary sector, including public interest and community organizations, is also well-organized and many have long considered advocacy to be an important component of their programs. By contrast, legal services in Canada have concentrated on individual assistance. Little funding has been received from private foundations and few organizations have been able to afford staff counsel. As well, it is only recently that advocacy has been a tactic used by the voluntary sector.

There appear to be two somewhat distinct phases in the development of advocacy in the U.S. The first wave, as it has been called, involved interest organizations which employed lawyers to accomplish the goals of their membership. The next phase began with the poverty lawyers in the early 1960's and expanded to include the public interest law firms, which first received financial support from the private foundations towards the end of that decade.

A. Pre-1960: The First Wave

Until the 1960's, public interest advocacy in the U.S. was concentrated in three main areas:

1. Operation of legal aid offices
2. Civil liberties, primarily through the American Civil Liberties Union
3. Civil rights, largely through the National Association for the Advancement of Colored People/Legal Defence and Education Fund (NAACP/LDEF)

1. Legal aid offices

Although the primary focus of legal aid is to provide a service to individuals who are not able to afford lawyers, it contributed to the development of public interest advocacy in two important ways. First of all, legal aid lawyers identified law reform as a necessary aspect of the range of legal services which they were making available to the disadvantaged.

Secondly, the establishment of an office to offer subsidized legal services was a radical departure from the charity approach previously taken by private law firms with those who could not afford lawyers' fees. A specialized office offered the following advantages:

- lawyers did not have to worry about satisfying the monetary needs of their firms when providing services to the disadvantaged
- lawyers were able to consider the broad policy implications of the work they were doing
- expertise could be gained in areas which private law firms tended to disregard

The first legal aid office opened in New York City in 1876. Funding was made available by the German Society of New York to provide services to immigrants from Germany. By 1900, there were offices in 6 cities expanding to 41 by 1917. However, the total remained less than 50 for the following 20 years.

Until the 1930's, these offices were funded by the cities in which they were located. Increasing municipal expenses at that time forced legal aid to turn to community chests for financing.[13]

Legal aid has made a significant contribution to public interest advocacy by developing a new and effective method of delivering specialized legal services. However, the actual involvement of legal aid lawyers in the public interest area is far less clear. One analysis is that

> almost exclusively, the assistance provided by the various legal aid organizations in the U.S. was reactive to acute problems rather than anticipating the problems or eliminating their sources[14]

2. American Civil Liberties Union

The emergence and development of the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Coloured People Legal Defence and Education Fund (NAACP/LDF) have been described by one author as the "first wave" of public interest law organizations in the U.S, serving as prototypes for some present day delivery systems.[15]

The ACLU began as an ad hoc, defensive organization which was largely reactive in nature. Its activities were, and still are for the most part, aimed at the representation in court of dissidents, lobbying for social change through legal reform, publicizing abuses of human rights and organizing public protests of such abuses.

The ACLU was founded in 1916 as the American Union Against Militarism. From the AUAM, a splinter organization, the National Civil Liberties' Union was formed. The Union represented pacifists and conscientious objectors during the First World War and unions resisting government repression during the 20's. It was at this time that the organization was renamed the American Civil Liberties Union.

The primary focus of the ACLU has been the preservation of the fundamental rights and freedoms contained in the American constitution. Due to a lack of resources, much of its earlier legal advocacy consisted of presenting amicus briefs in consititutional cases. More recently, it has been able to provide full representation to individuals or organizations whose rights have been infringed. As a result, the Union has been associated with many landmark constitutional cases in its more than 60 years of existence[16]. (See Appendix I for a fuller discussion of the ACLU's legal advocacy).

The ACLU was the first public interest advocacy group to receive broad support from the public. This was accomplished by successfully combining an active lobby with litigation -- a model that was to be copied by later organizations such as Nader's Public Citizen. The Union also broke new ground by establishing a network of independent affiliates across the U.S. at both the state and local level.[17]

3. NAACP/Education and Legal Defence Fund

The NAACP was founded in 1909 as a lobby and service organization to improve race relations in the United States. It was not until the 1930's that the organization consciously selected a program of legal advocacy through test cases to achieve its goals. It is this period that is considered to be the beginning of policy oriented public interest law in the U.S.[18]

The NAACP's Education and Legal Defence Fund Inc. (ELDF) was formed in 1939 to handle the parent organization's legal work. This completed the change from an ad hoc. reactive litigation effort to a unified. cohesive legal attack on all forms of racial discrimination. By 1954, the Fund had won 34 of the 38 cases it had argued before the Supreme Court -- victories which had an enormous impact on the legal and political systems of the U.S.

The model which it used was similar to that used by the ACLU, where a small corps of full-time lawyers chose cases of national significance and effected policy change through litigation. Through this method, the ELDF was able to systematically attack legislation which permitted segregation in schools and public facilities.[19]

The approach used by the ACLU and the ELDF has been adopted by many of the public interest law centres which currently operate in the U.S.

B. Post-1960: The Second Wave

During the mid-1960's and into the following decade, several factors combined to cause a rapid expansion of public interest advocacy, including:

- wide-spread sensitivity and development of organizations around public interest issues such as environmentalism and consumerism

- changes in laws which allowed class actions to be brought more easily and relaxation of rules restricting public interest access to the regulatory process (described in Appendix I)

- decision by a number of private foundations to fund public interest law firms

As a result, by the mid-70's. there were approximately 100 public interest law firms in the U.S. and more than 50 private law firms where greater than 50% of the practice consisted of public interest work.

A report done by the Council for Public Interest Law in 1976 suggests that the public interest lawyers in the U.S.. which represent less than .15% of the American bar have had a large impact on U.S. society. In particular, they have made major contributions in such areas as:

- civil rights
- poverty
- environment
- utility rate reform
- women's rights
- mental health care
- product safety

The following discusses the development of U.S. advocacy over the last two decades, under the following headings:

1. Government Legal Services
2. Voluntary Sector
3. Private Sector

1. Government Legal Services

During the War on Poverty in the 1960's. the U.S. government established the Neighbourhood Legal Services (NLS) program, through the Office of Economic Opportunity (OEO). The program was established with the very broad objectives of delivering legal services to the poor and of undertaking litigation and law reform to remove the causes of poverty. The first director of legal services in the OEO summarized his view of the NLS mandate in this way:

> We cannot be content with the creation of systems rendering free legal assistance to all the people who need it but cannot afford a lawyer's advice. Our responsibility is to marshal the forces of law and the strength of lawyers to combat the causes and effects of poverty. Lawyers must uncover the legal causes of poverty, remodel the systems which generate the cycle of poverty, and design new social, legal and political tools and vehicles to move poor people from deprivation, depression and despair to opportunity, hope and ambition.[20]

In 1974, the NLS offices were incorporated into the new Legal Services Corporation (LSC). By 1977, law reform had emerged as the major priority for the LSC. The question of whether their limited resources were better placed in providing legal services or in conducting law reform was a long and difficult one for the LSC.[21] However, it was ultimately decided that more could be accomplished for the poor by undertaking litigation and lobbying to change existing structures than by providing legal advice regarding individual problems.

At the same time, Backup Centers (now called Support Centers) were created to provide the informational and research capacities for the law reform activities of the LSC offices. Each Center was issue-specific, focussing on a particular problem area such as employment discrimination, health, etc. Over time the Centers became more oriented towards supporting litigation in the LSC offices through the preparation of legal memoranda than in conducting research or preparing educational materials.[22]

The reorganization of the LSC in the mid-70's spawned more involvement by the private bar, both through LSC operations and Bar involvement in the birth and growth of the LSC. LSC guidelines required Legal Services to operate through existing, local legal aid societies or local bar programs. Moreover, the American Bar Association was deeply involved in the development of the LSC, which facilitated acceptance of the Corporation by the private bar. This connection was furthered by the regular and free interchange of lawyers between the LSC and private practice -- most LSC lawyers saw themselves as on short-term leave from private practice.

As a result, as some observers have noted, the "LSC provided a highly visible, private bar sanctioned model for law reform. ... its success, coupled with that of the NAACP, was a factor in the development of voluntary PIL activities."[23]

2. Legal Services Provided by the Voluntary Sector

Public interest advocacy conducted through the voluntary sector has involved both the continued development of organizations such as the ACLU and the NAACP/LDF as well as the more recent and rapid growth of the public interest law firm.

During the last couple of decades, the American Civil Liberties Union has received funding to move beyond its former amicus role and directly undertake test cases. involving important civil liberties issues.

For example, in 1966. ACLU lawyers acted for a group of black citizens living in Chicago in their attempt to force the Chicago Housing Authority to stop selecting housing sites that maintained a racially segregated housing pattern. Although the process took six years and went through several appeals. the plaintiffs were eventually successful in overturning not only the site selection process but various other discriminating housing laws and practices as well. Following ACLU practice, the litigation was undertaken on a pro bono basis by two lawyers who were partners in major Chicago law firms.[25]

In 1967, the ACLU supported the historic Tinker case in which the U.S. Supreme Court held that a school board could not forbid students to wear black armbands in protest of the Vietnam war, and thus established that students have the right to peacefully express their views in school. Similarly, the ACLU has assisted in the preparation of a Bill of Rights for high school students.

During the 1960's, the NAACP/LDF set as a priority the defence of those charged with criminal offences resulting from civil rights movement activities. More recently, the Fund has become involved in other forms of law reform such as litigation under Title 7 of the Civil Rights Act to prevent discrimination in employment. The Fund's development of their "co-operating attorney" program has broadened its scope significantly. Under the program, attorneys across the country were recruited to do both pro bono and fee for service work for the Fund. which served to increase contact between the LDF and the larger legal community.

One of the keys to the longevity and success of the ACLU and LDF has been their ability to create and sustain a dynamic link between a committed membership and staff on the one hand. and a legal community willing to donate considerable volunteer efforts on the other.

The development of the public interest law firm in the mid- to late-1960's has been described as the second wave or major development in the U.S. history of public interest advocacy.[26]

Ralph Nader who was responsibile for forming several of the first of these public interest law firms. described the objective of this new generation of advocates in this way:

> ... it is abundantly clear that our institutions ... are not performing their proper functions but are ... serving the special interest groups at the expense of voiceless citizens and consumers... a primary goal of our work is to build countervailing forces on behalf of citizens.[27]

The public interest law firm marked a major departure for the delivery of subsidized legal services similar to the inception of legal aid offices at the turn of the century. Because it was structured like its commercial-corporate counterparts. it was able to conduct litigation directed at social change with the benefits of a corporate law firm structure, including:

- centralized control over caseload

- stimulating collegiality with a full-time professional staff

- an opportunity to specialize in a particular area

In the late 1960's and early '70's. the Ford Foundation was the preeminent funder of public interest law firms. Examples of firms which received support from the Ford Foundation[28] include:

a) The Centre for Law and Social Policy (CLASP) in Washington, D.C. , which is engaged primarily with the consumer, environmental and mental health fields. CLASP has effectively used law students selected through clinical programs in several law schools across the United States.

b) The Center for Law in the Public Interest in Los Angeles employs five lawyers. Areas of priority include environmental and land use law and minority employment.

c) The Citizens Communication Center in Washington, D.C., monitors the broadcast industry for fairness and equal time and intervenes in licence renewal hearings.

d) The Environmental Defence Fund (EDF). also located in D.C., is engaged exclusively in environmental litigation and policy. Because of its high profile, the EDF has been able to sustain a large membership. which in turn has been the source of a large portion of its funding. As the Fund was established by a committee of scientists. it also has close connections to the scientific community, using committees of experts for advice and keeping scientists on staff for periods of time.

e) The Institute for Public Interest Representation in Georgetown which is engaged in training and some litigation with other firms and research in the regulatory. health. food and drugs, communication and transportation areas.

f) The Natural Resources Defence Council (NRDC) in New York City and the U.S. Capital, which is engaged in litigation and law reform relating to environmental, energy and waste management issues.

g) The Sierra Club Legal Defence Fund which now has offices in San Francisco and Alaska and which is involved exlusively in litigating environmental matters.

h) The Women's Law Fund in Cleveland. which is engaged in litigation and education against sex discrimination.

Other public interest law firms have been similarly engaged in consumer protection, employment discrimination advocacy, mental health advocacy and freedom of information litigation. These organizations have broadened the range of value advocacy in the U.S.. mostly through the support of about 30 foundations such as the Ford. Carnegie and Field Foundations.

In the tradition of the "first wave" delivery systems such as the ACLU and LDF, many of the new firms have also developed "cooperating attorney" networks. The Sierra Club Legal Defence Fund. for instance, supervises a nationwide litigation program through voluntary and retained lawyers, as well as handling cases in its own right.

As of 1983, only the Women's Law Fund in Cleveland continued to receive support from the Ford Foundation. All of the other organizations listed above are still in existence (although in a more limited form), but have not had the benefit of Foundation support since 1980.

Observers have suggested the following explanation for the Ford Foundation's declining interest in funding advocacy litigation:

- the increasingly controversial nature of such activities
- the advent of a conservative national government
- a change in the executive of the Foundation and hence in its philosophy which led to a restructuring of priorities based on

As a consequence, the organizations in question have been forced to pare down the services they can offer. In addition, they are compelled to seek a more diversified funding base through membership drives, direct-mail techniques, government funding and greater reliance on relationships with LSC staff lawyers.

3. Private Sector Activity

With the development of government and foundation funded public interest law came an increased impetus for involvement of the private bar. "Pro bono publico" work had occurred since the 19th century, but it was only in the 1960's that it became more systematic.

A variety of experiments were attempted by various law firms across the country. They included:

i) a pro bono or public interest law department as a permanent feature of a firm

ii) a firm with one coordinator of individual efforts in the PIL field

iii) firms with PIL branch offices

iv) firm participation in a legal services program[29]

Even more ambitious was the creation of the "mixed firm", which provided legal services for profit to private clients in order to finance PIL activities. Few firms have successfully operated under this kind of model.

Finally, there were numerous examples of lawyers who were willing to donate their time to a particular cause.

As public interest law firms developed and as the Legal Services Corporation became more oriented to law reform and test litigation, fewer private law firms were willing to establish formal structures to undertake public interest litigation. One study conducted in the early 1970's, found that "less that one percent of the work of lawyers in private practice is of the PIL type."[30]

Instead. the U.S. Bar now contributes to public interest law primarily as co-operating attornies with organizations such as the ACLU and LDF and through the American Bar Association which has systematically supported PIL activities through various committees and projects since 1971.

CHAPTER III

THE DEVELOPMENT OF CANADIAN PUBLIC INTEREST ADVOCACY

As described in the last chapter, public interest advocacy in the United States rapidly evolved in the late 60's. resulting with the establishment of more than 100 public interest law firms across the country and the setting of law reform as the first priority of the Legal Services Corporation.

This evolution has not occurred to nearly the same degree in Canada. It appears that little use was made of advocacy tactics much before the 1970's. except for occasional litigation sponsored by civil liberties organizations.

It is difficult to isolate the reasons for the relatively infrequent use of legal advocacy (at least until recently) by Canadian public interest groups . However. it is clear that the following contributed at least in part to the differences observed betweem the two countries:

- Organization around public interest issues such as consumerism and environmentalism did not take place to nearly the same degree in this country as it did in the United States .
- Canada did not have fundamental rights and freedoms enshrined in a constitution until very recently
- The U.S. made it possible for class actions to be brought more easily by public interest advocates almost two decades ago
- Private foundations in the United States actively funded public interest law centers

An indication of the comparatively low level of advocacy here is that very little has been written about public interest advocacy in Canada (although it is well-documented in the U.S.). As a result. much of this chapter is based on discussions with those who practice in this area of the law[31].

Public interest advocacy has developed in three main areas in Canada:

A. Public interest organizations which retain full-time or ad hoc legal counsel

B. Public interest law firms

C. Legal Services provided directly by Government

A. Public interest organizations with legal advocacy component

Very little that can be considered to be public interest advocacy on the level of that undertaken by U.S. groups such as the ACLU and NAACP occurred in Canada before the 1970's. Undoubtedly, legal services were provided to public interest organizations and some lobbying to effect legislative change was carried out; however. what literature that exists on this subject and my conversations with those involved with public interest groups suggest that advocacy was not a tactic routinely used by groups in Canada until very recently.

At the beginning of the last decade, a number of Canadian organizations began to use advocacy in much the same manner as the ACLU and the NAACP. That is. a concerted program of law reform and intervention was identified as one of the group's priorities and staff counsel and/or volunteer lawyers were recruited to carry out the program.

One organization which adopted this strategy is the the Consumers Association of Canada. In an article in the Canadian Journal of Political Science, Jonah Goldstein describes the formation of the organization and traces its activities to the late 1970's.[32]

The group was formed in 1947 as a follow-up to efforts by women's organizations to assist the consumer branch of the Wartime Prices and Trade Board in maintaining price controls and answering consumer complaints during the war. During the first two decades, its activities centred around meetings with government and industry about consumer issues -- a process which has been described as the "politics of accomodation".[33]

It was not until the late-60's that both the membership and funding of CAC increased and the organization became more activist-oriented. It was at this point that its Board of Directors established legal advocacy as a priority and obtained funding for staff lawyers from the Federal Department of Consumer and Corporate Affairs. Consumer and Corporate Affairs Canada continues to provide annual grants to CAC for this purpose.

Goldstein describes the CAC as a general public interest group with "diffuse interest and memberships without strong collective goals" and contrasts this with constituency groups which have "overriding purposes and a membership committed to those goals."[34] The former -- although until recently the most common form of Canadian public interest organization -- has. in his opinion been less effective in influencing public policy, because of:

- financial dependency
- limited legitimacy
- difficulty in defining priorities

One difficulty with Goldstein's analysis is that he does not indicate how the impact on public policy was measured. Constituency organizations, such as environmental groups which form around one short-term issue, are often extremely effective in their public advocacy. For example, concern about such questions as the disposal of toxic wastes or the spraying of herbicides can often generate a great deal of public discussion and media attention. However, as will be discussed later, this does not necessarily translate into changes in public policy unless an effective legal advocacy program is also undertaken.

The CAC appears to have determined a course of action where it will have maximum impact for its members. This includes:

- intervention in regulatory hearings

- appearances before parliamentary committees

- lobbying on consumer issues

Few, if any constituency organizations have the resources, the knowledge or the longevity to undertake legal advocacy in a consistent manner and thus are unlikely to have as great a long-term impact on public policy as the CAC.

The civil liberties organizations were also among the first in Canada to use legal advocacy as a means of accomplishing the goals of their memberships. The B.C. Civil Liberties Association was formed at the end of 1962 -- the first such organization in this country. Throughout the rest of that decade various other provincial chapters were set up, as well as an umbrella organization called the Federation of Rights and Freedoms, which was formed in 1972. In the mid-60's, the Canadian Civil Liberties Association was established independently and operates primarily at a federal level.

The broad range of issues which the BCCLA tackles in the civil liberties area can be illustrated by the permanent and ad hoc committees which have been established within the organization:

Freedom of speech and association
Invasion of privacy and access to information
Due process/police and the community
Administrative decision-making
Patients' rights
Children's rights
Discrimination

Through these committees (and a small core staff) the BCCLA handled over 400 complaints from citizens during 1982 and produced 13 briefs responding to proposed federal and provincial rights and promoting increased protection of civil liberties. Legal counsel are obtained on an ad-hoc basis to develop law reform positions and to represent the Association or individuals whenever important civil liberties issues can be placed before the courts.

Major accomplishments of the organization in the area of legal advocacy include:

- Georgia Strait: The Georgia Strait is a newspaper which began publishing in the mid-60's. Because of its controversial content, the paper was subject to a series of police break-ins and arrests over a period of 6-8 years. The BCCLA arranged for lawyers to defend the Strait against the continual prosecutions. As a result, the newspaper was eventually left alone and the issue of freedom of the press gained a high profile.

- Charter of Rights: The Association presented a comprehensive brief before the parliamentary committee on the Charter of Rights. Many of the recommendations of the BCCLA were incorporated in the Charter.

- Police Act: The BCCLA worked with the provincial Attorney-General's department in developing a consensus on legislation to regulate the police in B.C.

A further example of a public interest organization which has developed an advocacy strategy to accomplish its objectives is the Canadian Association for the Mentally Retarded. As with civil liberties, the national organization is a federation of 10 independently established provincial organizations.

Although initially formed locally to lobby for better schooling for the mentally retarded and to provide support services for families caring for the mentally retarded, the provincial and federal organizations have, over the last 10 years, directed their attention to broader law reform goals involving advocacy work.

The federal organization employs one full-time counsel who is involved in a wide variety of advocacy, including law reform and test cases. For example, the CAMR lobbied the Federal government in coordination with the provincial groups (in particular, B.C.) to obtain amendments to the Federal Human Rights Code to allow the mentally handicapped to be included. As well, as a result of this pressure, objectionable sections which provided the employer with discretion to fire the mentally retarded in certain situations were also removed.

The CAMR also supported a recent test case which involved the right to self-determination by the mentally retarded. In that case, David Baker of Ontario's Advocacy Resource Centre for the Handicapped acted for Justin Clark, who was successful in blocking his parents' application to have him declared mentally incompetent.

The advocacy activities carried out by the provincial organizations vary substantially across the country. In B.C., for example, the British Columbians for Mentally Handicapped People carries on its advocacy through a Legal Task Force that has been in existence for 8-9 years. Those on the task force donate their time although, in major cases, a reduced fee and disbursements are paid to counsel.

Over the last 10 years, the BCMHP has been active in law reform, appearing as amicus in important civil cases and presenting submissions at coroners' inquests.

Law reform work includes the amendments to the Federal Human Rights Code described above, changes to the Coroners Act and the Patients Property Act. The goal of these activities is to strengthen the rights of mentally retarded people.

The BCMHP was also involved as amicus in a recent high profile case involving the rights of a mentally retarded boy, Stephen Dawson. In its decision, the B.C. Supreme Court accepted the submission of counsel for Stephen Dawson as well as the amicus brief of the BCMH and ordered an operation which was necessary to keep Stephen alive, against the wishes of his parents.

There have been several coroners' inquests regarding the deaths of mentally retarded persons, where the BCMHP has played a significant role. For example, one inquest involved the alcohol overdose of a retarded woman while another dealt with food poisoning which occurred at an institution for the retarded. The object of participating in these inquests has been to educate policy-makers and the public about the rights of the mentally handicapped and to cause changes in legislation and/or policy.

Much of the advocacy which is carried out by public interest organizations is done on an ad hoc basis, because many groups do not consider advocacy to be a priority or because it is difficult to secure the services of a lawyer. It is much more difficult to identify this component of public interest advocacy because it occurs on a number of different levels -- through pro bono work by interested lawyers, through public interest law firms, through funding or costs made available by inquiries or regulatory hearings, etc. -- and because little has been written about it in Canada.

However, as is evident from the preceeding discussion. it is the more mature public interest organizations in Canada which have been able to make the most effective use of sympathetic lawyers. For example, both the B.C. Civil Liberties Association and British Columbians for Mentally Handicapped People have lawyers on Committees. who are used to represent the interests of the organization on a pro bono or reduced fee basis.

Access to lawyers who will donate their time appears to be correlated to several factors. including:

- status of the organization (and its directors) in the community
- length of time that the organization has been in existence

A study conducted for the Department of Justice by Christine Wihak entitled "The Needs of Community Groups for Public Legal Information" found that few groups had access to volunteer lawyers. Only 10% of housing. family and community and anti-poverty groups reported use of a volunteer lawyer, compared to 20% for environmental. 30% for disabled and 60% for seniors. That is. few groups are actually able to gain access to lawyers in the community.

Ms. Wihak found that "the groups with volunteer experts are, with the exception of three Seniors' groups, the same groups that have paid staff."[35] Thus, those that have been existence long enough to secure staff and a funding base, are also those who are able to seek out legal help

Unless the lawyer involved has had an on-going relationship with the organization and is therefore familiar not only with its goals but also with the law relating to the area of concern. it may be difficult for the lawyer to adequately represent the group's interests. This problem was identified by the West Coast Enviromental Law Association. which found that it had to provide considerable legal support when they referred clients to lawyers who did not practice environmental law. Where such support services do not exist, the group itself must assume the burden of educating the lawyer about its needs and the available political and legal remedies.

B. Public Interest Law Firms

At present, there are less than ten public interest law firms operating in Canada. Although a variety of precedents existed for such firms in the U.S., the lack of private foundation support has caused their development in this country to be much slower. As well, the range of activities undertaken by these firms is far more limited here. In particular, access to the courts is restricted because of narrow rules relating to class actions and standing for public nuisance, because no Constitution guaranteeing individual rights existed until recently and because legislation gives the civil service far more discretion in the policy decisions they must make.

In general, it is the Federal Government and several provincial Law Foundations (which obtain revenue from the interest earned on lawyer's trust accounts) that have made possible the operation of the existing public interest law firms.

The first such firm -- the Canadian Environmental Law Association -- was formed in 1971. in a climate of increased public concern about environmental protection. Its primary goals are to promote laws which allow increased environmental protection and citizen involvement in environmental decision-making. Commencement of the Association's activities was made possible by an employment grant from the Federal Manpower Department. The immediate demand for the services which CELA offered made it possible to obtain funding from other sources and eventually to obtain sustaining grants in the mid-70's through Ontario's clinical program.

Some of the many activities which CELA has been involved with over the last decade include:

- lobby for the introduction of a provincial environmental impact assessment act
- acting for citizens concerned about protecting wilderness areas
- prosecuting a company for violation of the _Fisheries Act_
- preventing the establishment of a toxic waste dump in an environmentally sensitive area

Since CELA's formation, environmental law centres have formed in other urban centres in Canada.

The West Coast Environmental Law Association was founded in 1975, with essentially the same objectives as CELA. It also began its initial operation with an employment grant from the Federal Government and has operated summer student and other special programs through such grants since that time. The proven need for WCELA's services have allowed it to obtain yearly grants from the B.C. Law Foundation to cover its operating costs. WCELA's activities in recent years include:

- judicial review of the province's Environmental Appeal Board
- prosecution of a municipality for improper management of a waste site
- representation of a public interest group at the first major energy project review held under the Utilities Commission Act with the establishment of important precedents for costs and procedure

In 1981, the Alberta Environmental Law Association was established with funding from the Alberta Law Foundation.

The other major category of public interest law firm in Canada is the public interest advocacy centre. The first such centre was established by Andrew Roman, a lawyer who had previously worked as staff counsel with the Consumers Association of Canada. As with the CAC's Regulated Industries Programme, the first PIAC was funded by the Federal Department of Consumer and Corporate Affairs.

The objectives of PIAC are to provide legal representation in cases involving important public interest issues and to provide advocacy training. Since the opening of the first Centre, other offices have been set up in Ottawa and Vancouver. The latter began operation in 1981 with an independent Board of Directors and a grant from the B.C. Law Foundation.

The three PIAC offices have been largely involved in representing public interest clients at regulatory hearings. These include:

- acting for the Federated Anti-Poverty Groups at a recent rate application by B.C. Hydro before the B.C. Utilities Commission
- appearances before the CRTC on behalf the National Anti-poverty Organization, the CAC and the Inuit Tapirisat of Canada regarding rate applications by Bell Canada and B.C. Tel
- intervention at CRTC hearings regarding the licencing of Pay-TV

There is little assurance that continued support will be given to these law firms (except, perhaps CELA. which has clinical funding which appears secure at this time). For example, the West Coast Environmental Law Association has had its funding substantially reduced by the B.C. Law Foundation over the last year and may have to reduce the scope of its activities.

With the staff and financial resources which these law firms have, they are only able to serve a limited clientele in specific areas. The PIACs, for example, have as their first priority the disadvantaged consumer. As well, the Environmental Law Centres set priorities on the kind of environmental cases they will handle. Much of their practice is therefore oriented to test litigation and law reform and in the case of PIAC to participation in rate hearings, in order that the widest spectrum of people will benefit. It is also for this reason that advocacy training is undertaken and rosters of lawyers are established who will take cases on a pro bono or reduced fee basis.

C. Legal Services Funded Directly By Government

Public interest law delivery systems in the U.S., with its more centralized government and federally oriented division of powers, were often developed in a larger, national context. By contrast, each province in Canada has its own discrete, statutory-based system of subsidized legal services. Moreover, each system operates in a different political context.

Experience clearly shows that the quantity and quality of public interest advocacy services available provincially is directly related to the current social, political and economic situation in each respective province. For example, the NDP government of Manitoba recently funded jointly with the federal government a department of legal aid to be concerned exclusively with providing legal services on public interest issues, while the government of B.C.. in the throes of a restraint program, effectively closed down all consumer services in the province and has reduced funding to legal aid.

As well, the political climate can also determine the forums which are available for the discussion of public interest issues and thereby encourage or discourage the formation of public interest organizations. This in turn affects the demand for advocacy-type legal services.

In the remaining portion of this chapter, I describe the legal services which are available from the federal and provincial governments, as they relate to public interest advocacy.

1. Federal Funding of Public Interest Law

The majority of federal funding for legal services is provided through cost-sharing programs with the provinces. for the jurisdictional reasons set out above. As a result, little control can be exerted over the type of service which each individual province offers. unless the funds are tied to a specific program. To date. few provinces have moved beyond individual legal aid to offer services such as law reform or group representation as is available through the Legal Services Corporation in the United States.

However, through the Department of Justice, the Federal Government has directly contributed to a number of innovative programs designed. amongst other purposes, to offer advocacy services regarding public policy issues. These include:

i) Farmworkers' Legal Services Project

This project was established in May, 1981 to provide farmworkers with free legal advice. Apart from the Department of Justice, funding for the project has been obtained from Matsqui-Abbotsford Community Services Society, the Law Foundation and the Department of Justice. During its existence, the Project has actively pursued changes in the law which would improve the living and working conditions of farmworkers, including:

- elgibility of farmworkers for Workers Compensation
- involvement in a municipal committee to draw up by-laws governing living conditions for farmworkers
- participation in a coroners' inquest concerning the use of pesticides by farmworkers

ii) Mental Patients' Advocate Project

This project was established by the Vancouver Community Legal Assistance Society in 1977 to provide free independent legal advice to mental patients. Funding is provided through VCLAS and until recently by the B.C. Law Foundation. The Department of Justice has made grants available to MPAP over the last three years. In addition to providing legal services directly to clients, the Advocate Project has conducted a series of test cases which have contributed substantially to law reform in the treatment of mental patients. Examples include:

- cases which have established the criteria to be applied by the courts when a patient petitions for release from a mental institution
- action against the Public Trustee for improper management of a mental patient's funds
- judicial review of a panel responsible for determining whether a mental patient should be released from an institution

iii) Manitoba Public Interest Department

The PID was established in 1982 to exclusively handle public interest cases. The Department of Justice funds the salaries for one staff lawyer and paralegal while Manitoba legal aid pays for another lawyer and a secretary. Since its inception, the PID has handled a number of important cases, including:

- lobbying on behalf of residents to obtain an inquiry on urban renewal taking place in an inner-core area and eventually representing the residents at the inquiry
- commencing Charter actions regarding prisoners' rights and rights to education
- acting for a public interest group concerned about pesticide spraying

The Federal Government also provides financial support for advocacy through other ministries. For example, as described earlier, Consumer and Corporate Affairs provides funding for the Public Interest Advocacy Centre in Ontario and the CAC's Regulated Industries Programme.

The programs described above are designed to be active in areas of provincial as well as federal concern. One important aspect of public interest advocacy which is exclusively related to federal jurisdiction is representation of Indian organizations. The Federal Government has taken some steps to ensure the existence of advocacy services in this area. For example, the Union of Indian Chiefs has been able to employ full-time staff counsel to provide legal advice to the Union and Union members with funding which was initially obtained through the Department of Indian and Northern Affairs (and more recently through the B.C. Law Foundation). Lawyers working with the Union have been extremely successful in promoting Indian rights through legal channels and have been involved in such actions as:

- Protection of rights granted under treaties, including the food fishery and hunting
- Negotiation of land claims
- Preservation of aboriginal rights in the Charter

However, it was not possible to find other examples of direct DINA participation in advocacy services for Indian bands, suggesting that funding in this area is not a priority.

Apart from the funding to CAC and PIAC noted above, few resources are made available for public interest participation before federal regulatory tribunals. Groups or individuals that wish to intervene before such regulatory bodies as the CRTC, the AEB, the CTC or the NEB are heavily constrained by cost factors. An effective intervention in a regulatory proceeding can cost in the tens of thousands of dollars in legal fees alone. One lawyer, who has participated in regulatory hearings estimated that the average cost of a lawyer-represented intervention was $50,000.00.[36]

Because of the expense involved, public interest participation is extremely limited in federal tribunal proceedings apart from the CRTC (which is the only federal administrative agency to award costs). Groups have appeared before the National Energy Board, the Canadian Transport Commission and other tribunals; however, their participation has rarely involved the presentation of expert evidence or even the appearance of legal counsel. Where lawyers have appeared, it has generally been through the assistance of a public interest law firm such as PIAC or the Environmental Law Associations or through the CAC's Regulated Industries Programme.

Without financial assistance through costs or other mechanism of subsidization, interests other than the applicant seeking approval from the agency can never be adequately represented, or weighed on an equal basis with the private interests. This is despite the fact that 89 federal statutes make reference to the public interest and 20 make reference to public hearings. A study paper on "Public Participation in the Administrative Process" done for the Law Reform Commission of Canada commented on the difficulties caused by a lack of funding and the limitation on services that could be provided by public interest law firms:

> The Public Interest Advocacy Centre, and other public interest lawyers provide a voice for the expression of public concerns. Given the level of intervenor cost awarding in Canada ... and the lack of an official public advocate, public interest law firms will continue to be one of the few means of developing expertise in the area of public interest representation. Unfortunately, few individuals are able to convince such firms that their interests deserve representation; an issue of major importance to a community or individual may not have province or nation-wide impact and, therefore will be rejected. This occurs partly because there are very few public interest law firms, and also because operative firms must constantly justify their existence to their financial sources. A localized concern, no matter how needful of resolution, will not attract the media coverage required by the public interest law firm in its funding campaigns. These firms require more stable financing, available for extended periods of time. There is also a need for greater availability of _pro bono publicum_ worktime at regular law firms.[37]

It should be noted that prior to its dissolution as a Ministry in July of 1984, the Ministry of State for Social Development was developing a policy of costs for intervenors in federal regulatory hearings.[38]

2. Overview of Provincial Legal Aid Services

The range of free legal services which have been made available to groups and individuals in Canada varies widely from province to province. The majority use a combination of staff lawyers (legal services) and referrals to the private bar (judicare) to provide legal aid. However, little that can be considered to be public interest advocacy has resulted from these basic programs for the following reasons:

i) Inadequacy of Funding: Low levels of funding have ensured that centres providing legal services have been unable to keep up with their individual caseloads; hence, little or no time has been available to tackle the legal problems of the poor in a more positive and proactive manner.

ii) Priorities: Unlike the U.S. Legal Services Corporation which established law reform as its top priority, the primary focus of legal aid programs in Canada is to provide lawyers on an individual basis.

iii) Eligibility: Most programs do not have special provision for the certification of groups. As a result, few have been able to qualify for subsidized legal services even if their memberships would have qualified individually for assistance.

In recent years, some provinces have established programs to spread their legal services further, in response to the recognized gaps in the availability of legal aid. These have often involved secondary type services, where no direct lawyer-client relationship is involved. As well, they have tended to emphasize law reform and legal services to groups as a way to reach those who are unable to obtain the direct services of a lawyer. Examples include public legal education, community law offices using trained paralegals, clinics targetting specific disadvantaged groups, etc.

Although certain provinces have opted for a range of these more general services, others have narrowed their legal aid programs to the basic minimums of criminal and family services. The following is an overview of the various approaches taken by the provinces and the impact that their approach has on the availability of legal services for public interest advocacy.

a) Quebec

Quebec's Commission des Services Juridiques 1982 Annual Report shows a comprehensive list of public interest law activities delivered through a large network of community legal services offices. The Commission was active in the following areas: landlord-tenant, unemployed workers advocacy, mental health, handicapped, disabled rights, consumer advocacy, veterans rights, prisoner rights, senior citizens, environmental protection, sexual discrimination and orientation, occupational health and safety, housing, human and civil rights and daycare. In addition, the Commission, through its offices, undertook class actions suits in the areas of urea formaldehyde insulation victims, consumer protection and hospital patients rights -- actions made possible by provincial legislation allowing class actions to be brought.

The Commission was also involved in a number of education and law reform programs, including the funding of a variety of "study and research" committees in the fields of family, youth, auto insurance and UFFI as well as support for citizen actions against social welfare cutbacks.

Despite this range of activities relating to public interest advocacy, the 1982 Annual Report made it clear that "more energies by far are expended every day in representing clients than in community activities."[39]

The Quebec system is a departure from the judicare system of legal aid which is used in most regions of Canada. As noted earlier, judicare relies on referrals to the private bar, who provide representation to low income clients on a fee for service basis. By contrast, the legal service model relies on paid staff lawyers to provide the necessary legal services. In theory, the legal service approach allows far greater latitude for law reform and other advocacy-type activities than does the fee-for-service approach.

The Commission des Services Juridiques operates 148 offices around the province which are staffed by 334 staff advocates, 445 professional and support staff and 48 articled clerks. Legal services are provided primarily by the staff of these offices rather than being referred to the private bar. For example, in 1983, only 32.2% of Legal Aid cases were referred to the private bar.[40]

b) Manitoba

Several other provinces have moved to the use of neighbourhood law centres for the provision of legal services, including public interest advocacy. For example, Manitoba Legal Aid (MLA) operates a well-developed neighbourhood law centre system and permits its staff lawyers to engage in a variety of group actions, test cases, and law reform activities. Although it still refers three-quarters of its cases to the private bar. it also operates the Public Interest Law Department, which takes public interest referrals from other law centres in the province and handles them exclusively with staff lawyers.

The establishment of the Public Interest Law Department in 1982 represented an important evolutionary step in the provision of public interest legal services in Manitoba. Prior to 1977, the NDP government had experimented with Citizens Advisory Committees. which exercised some control over individual clinics. It was initially anticipated that the involvement of the CAC's would mean increased public interest advocacy by clinic lawyers. In an article on the legal aid system in Manitoba. Norman Larsen described why this did not happen:

> ... as initial enthusiasm and idealism declined and as the number of cases and budget problems increased, pressures to do something other than individual cases gradually eased and then disappeared.[41]

In other words, when the money became limited. the public interest cases were the first to be dropped. The Manitoba Legal Aid system was not unique in this way.

In 1977, when the Conservatives returned to government. the CAC's were dropped and few public interest cases were handled by the legal aid program.

With the re-election of the NDP in 1982, 2 specific changes were implemented to ensure that public interest advocacy would remain one of the priorities of the province's legal services:

- the regulations which set out the range of issues where subsidized legal services would be available were specifically amended to include questions of public interest. and more particularly, consumer and environmental issues
- The Public Interest Department was established to provide advice and counsel exclusively in relation to public interest issues and to take public interest referrals from other clinics

c) Ontario

Ontario also provides legal services using a combination of the judicare and community law office approach. Basic legal services in the family and criminal areas are provided both by staff members of legal aid offices and through referrals to the private bar. Parallel to this "traditional" mode of service is an extensive neighbourhood legal services system.

The Ontario "Neighbourhood Legal Aid Clinic" program was born in the mid-70's to deal with the perceived gap in traditional legal services as they pertained to poor people. Commissioner Grange, who conducted an inquiry into clinical funding in 1978 found that the following shortcomings were apparent in the existing legal aid plan:

* the poor were not always aware of the assistance provided by the plan

* traditional coverage did not meet certain indigent needs; e.g. landlord-tenant

* the problems of the poor often by their nature fell outside the traditional skills of the private bar

* the kind of legal advice which was made available to those who could afford lawyers, including analysis of legislation and protection of future interests, were not available to the poor

* the traditional system was unable to take a comprehensive approach to the problems of the poor[42]

The problems identified by Commissioner Grange suggest why Ontario expanded its traditional legal aid system to include a system of clinics which could offer more specialized as well as public interest-type legal services.

In 1978-79, the Ontario government allocated $2.5 million dollars to 31 different clinics. These clinics were divided between those which had a geographical base and those which were established under a broader definition of community. Ontario's Attorney General set out his government's concept of community in a speech in 1977:

> The term community also need not be restricted to its narrow geographic sense. Geographically diverse groups of immigrants, single parents, tenants, consumers, cultural associations and others all form communities which frequently need specialized and readily accessible legal assistance.
>
> Wherever there is a community of interest with legal needs but with limited resources, there is potential home for a community law project.[43]

Examples of the latter kind of community clinic include the

Canadian Environmental Law Association, ARCH, Justice for Children, Tenant Hotline, etc.

Most of these clinics are community based and community controlled, generally by a board of directors elected or drawn from the community served by the clinic. As the Grange Report pointed out:

> the object is two-fold: first to give the community, the intended beneficiaries, some control over the delivery of legal services; and second, to involve the deliverers of those services in the affairs of the community. If there are to be effective services to the poor, the traditional distrust felt by the poor towards lawyers, the legal profession and even towards the law itself, must be reduced"[44]

In Ontario, there had been some reluctance to fund group actions in the fee for service branch of Legal Aid, but there was none on the clinical side. Grange noted that these clinics made legal services available to many sectors of society, which previously had gone unserved:

> It is only realisitic to concede ... that the clinics... being dependent on the public purse must always be subject to consideration of political priorities. Nevertheless... the need for clinics has been demonstrated, if only by the volume of business generated each time one is opened; and if the need is there why should a large part of the province go unserved.
>
> ... the clinical movement is here to stay. Whatever misgivings may have been held at the start by the profession or by government have dissipated... what has happened is that the clinics have brought the law and its remedies to countless citizens of this province who otherwise would never have known its benefits.[45]

d) B.C.

Legal Services in B.C. are provided according to the following mandate set out in the *Legal Services Society Act* (1979):

> 3. (1) The objects of the Society are to ensure that
>
> (a) services ordinarily provided by a lawyer are afforded to individuals who would not otherwise receive them because of financial or other reasons; and

(b) education, advice and information about law are provided for the people of British Columbia

In reality, legal aid is now only available in serious criminal matters and and in contested divorces involving custody, despite the eligibility of the applicant. In Family Court matters, legal assistance is only possible where immediate security of person is threatened. Staff lawyers have discretion to take on other matters; however, they are overloaded with work as a result of the limitations now placed on the cases that can be referred to private bar.

At the end of 1983, the provincial government announced the establishment of a task force on legal services to consider the "nature, range and priority of legal services" and the "method of delivery"[46]. B.C.'s Attorney-General has announced that the Cabinet will review the recommendations of the Task Force in the fall of 1984 before deciding whether funding to the Legal Services Society should be cut further.

The LSS presently funds 15 branch offices and 7 Community Legal Services Offices (CLSO's). The Branch offices are administered by the LSS, while the CLSO's are governed by an independent community based board of directors. The Branch offices engage in routine legal services to individual clients as well as making referrals to private lawyers who handle the bulk of the legal aid work. The CLSO's, with their strong ties to the local community, find themselves engaged in litigation and advocacy that has broader implications for the disadvantaged in the community. A CLSO lawyer or paralegal may represent and individual in an administrative matter that affects others with similar problems. For example, the Smithers CLO commenced an action to force disclosure of medical information held in Workers' Compensation Board files. It has also represented citizen's groups who were concerned about herbicide spraying, before the Pesticide Control Appeal Board. Another CLO provided assistance to groups participating in the West Coast Oil Ports Inquiry.

The majority of the work handled by the CLSO's, however, relates to the individual needs of those walking in the door. Because resources are so limited, little energy can be expended in conducting law reform or group actions which require far more time and energy -- particularly when individual needs are so acute. In the last year, funding cutbacks have forced LSS to close two community law offices. Although the Smithers office has managed to keep its doors open through donations from the community for the two months since LSS funding was terminated, it is unlikely that it will be able to continue operating on donations alone. As well, as funding is further reduced by the provincial government, it is likely that further CLSO's will lose the financial support of LSS.

The LSS also administers eight projects for native peoples, but as with the CLSO's. there is little public interest advocacy involved because the projects are largely devoted to basic legal services.

One of the LSS branch offices is the Prison Legal Services Project at Abbotsford. One staff lawyer and two paralegals provide legal services to prisoners throughout the lower mainland. In addition to providing individual advice to prisoners, test litigation is undertaken on behalf of one or more prisoners to improve prison conditions for all prisoners.

LSS also partially funds Vancouver Community Legal Assistance Society. VCLAS is an independent organization which employs three lawyers who provide legal services to the disadvantaged as well as conducting test litigation in the areas of landlord and tenant. welfare. workers compensation. etc. (Please see Appendix I for a fuller discussion of cases handled by VCLAS). In addition. a VCLAS lawyer supervises the Mental Patients Advocacy Program (MPAP) at Riverview psychiatric hospital, which provides legal representation for individuals and undertakes law reform in the field of mental patients' rights.

The Farmworkers Legal Services Program (which was described earlier) uses an approach similar to VCLAS in providing assistance to farmworkers. That is. the FLSP not only delivers individual legal services. it also conducts law reform and test litigation. FLSP receives no funding from the provincial government (except a small amount for publication of materials). Its operating expenses have been provided primarily through the Federal Department of Justice and the B.C.. Law Foundation. Because of a recent reduction in financial support, the Program now only employs one paralegal.

e) Other provinces

Like the Quebec model, Saskatchewan also adopted the American system of delivering legal aid through staff lawyers rather than through a judicare systme. The Saskatchewan system relies more heavily on staff lawyers than does Quebec. Although the boards of Saskatchewan clinics were formerly elected by the communities in which they operated. legislation in 1983 eliminated this provision for community input.[47]

The provincial legal aid systems described above represent those which have taken the most innovative and comprehensive approaches to meeting the needs of the disadvantaged With the exception of Nova Scotia, the remaining provinces rely heavily on referrals of individual cases to the private bar. In an article on "Legal

Services and the Poor", Dick Gathercole summarized in this way the various methods of providing legal aid used across Canada:

> All provinces. with the exception of Prince Edward Island and New Brunswick, have well-developed legal aid programs. Most have a mixed Judicare and legal services system. Quebec. Saskatchewan and Nova Scotia have adopted legal services as the basic model with a limited Judicare component. The other provinces have adopted the Judicare model....
>
> Other provinces have drawn from the Ontario, Quebec and Saskatchewan plans for inspiration depending upon the political views of each provincial government and its susceptibility to the pressures of the provincial bar.[48]

The private bar he notes had an initial paranoia about legal services offices because of the fundamental social changes they feared would result. This fear has been overcome because social upheaval hasn't occurred and because the legal services offices have created work for lawyers in private practice.[49]

CHAPTER IV

THE USERS OF ADVOCACY SERVICES IN CANADA

The previous chapter described the manner in which lawyers are made available in Canada to undertake public interest advocacy. Chappter IV focusses on the other and equally important aspect of advocacy -- the users of these services.

It would be impossible to identify the many individuals and groups on whose behalf advocacy has been conducted. I have therefore selected a representative sample of public interest and community organizations, in order to assess the impact these groups have had on the development of advocacy in this country and to provide an overview of their use of advocacy. This discussion is prefaced by more general comments regarding the increased role of these groups in the political process and their ability to actually affect public policy.

The second half of this Chapter considers other areas where public interest advocacy in Canada is likely to develop in the near future.

A. Public Interest and Community Organizations

1. Increased Role in Policy-Making

There has been a rapid proliferation in the number of Canadian public interest organizations over the last two decades. In a publication which lists 164 such associations in Canada, many of which are coalitions or federations of smaller organizations, over 75% were formed since the beginning of the 1970's.[50]

As well, many organizations which existed prior to the last decade did not consider advocacy or participation in the political process to be an important part of their activities. This contrasts with the situation today where a large percentage of public interest organizations are involved in some aspect of governmental decision-making. For example, in a survey to assess the legal needs of community groups conducted for the Department of Justice last year, over 62% (36/58) of those surveyed listed litigation or involvement in public hearings and/or law reform as activities undertaken by the group.[51] An inventory of consumer groups in Canada conducted in 1978 for Consumer and Corporate Affairs found that 64 of the 198 groups that responded, or about 1/3 were involved with advocacy at some level.[52]

The single largest contributing factor to this development is likely the growth of environmental and consumer movements in the United States. The impact that these movements were having on the U.S. political system and the legitimacy which they were accorded by the media and some political figures not only made it acceptable for citizens to organize around issues, it also gave credibility to the various advocacy activities which were employed.

The Federal government also played a role in legitimizing the formation and activities of public interest organizations. A policy platform of the Liberals in the both the 1968 and 1974 election campaigns was participatory democracy -- a somewhat nebulous concept which involved the participation of citizens in decision-making on a continual basis rather than just on election day. Following the 1968 victory, the Trudeau Government implemented this platform with three distinct programs:

- establishment of consultative bodies such as the Advisory Council on the Status of Women

- creation of grant programs to support organized citizen participation (the amount allocated in 1969 was $30 million growing to $75 million by 1973)

- reform of traditional input mechanisms[53]

The impact which these changes actually had on the process and decisions of government is difficult to assess, as will be discussed in the next section. However, there is no question that public interest organizations became viewed as an important vehicle for the expression of individual concerns about policy issues, both by government and by society as a whole.

2. Impact on the Decision-Making Process

As described earlier, there are a number of legal and socio-political factors which account for the differences in the level of advocacy and the relative impact of interest groups between Canada and the United States. In particular, despite the change in attitudes regarding the decision-making process, the increase of public interest organizations and the steps taken by government to facilitate more public discussion, the Canadian political system still lacks much of the openness which is evident in the United States.

The closed nature of policy-making in this country has been commented on by many writers. For example, in a study conducted in 1978 for the Canadian Council on Social Development, Henry Chapin and Denis Deneau found that although the Federal Government had developed programs to increase public consultation, the power of the bureaucracy was not waning, government was not more open and the role of Parliament in developing policy was not strengthened.[54] A. P. Pross arrives at the same conclusion in a collection of articles entitled "Pressure Group Behaviour in Canadian Politics":

> One of the most striking features of current writing on Canadian politics is the continual reiteration of concern at the lack of openness in the policy system ... the limited capacity of the system to absorb and act upon demands generated by the public is a common theme.

Pross also suggests why this occurs:

> The root of the problem may lie in the fact that the process appears to operate principally through two relatively closed structures, the party system and the bureaucracy, both of which achieve an apex in Cabinet.

By contrast, the American system involves a party structure which is far less disciplined as well as independent administrative agencies which do not report to Cabinet. Both serve to create a more responsive decision-making process.

Although written in 1975, the conclusions reached by Pross are probably no less valid today:

> The system presents great impediments to those who want to raise new issues and who lack either the knowledge or the power to communicate and access. They find it difficult to locate the most effective channel through which to communicate with politicians or administrators.[55]

Pross documents that many of the organizations which are successful in affecting policy have developed a strategy which involves a one-to-one relationship with the bureaucracy and political leaders rather than a high public profile. While meeting with some success, this has also meant that forums have not been available for those organizations which do not have the resources or the knowledge to directly influence decision-makers.

Those organizations which are able to lobby effectively have generally been in existence long enough to develop an understanding of how decisions are made. As well, they are often broader-based and better funded. They have been described by Pross as the institutionalized organizations.[56] At the other end of his spectrum of community groups are the issue-oriented organizations which are recently formed, organized around a narrow issue and rarely well-staffed or funded. It is these groups which have little access to the "quiet" system of decision-making and which have the most to gain by demanding public hearings and by maintaining a profile in the media. Helen Jones-Dawson has stated that:

> issue-oriented groups. though they have a well-defined role in the system, tend to be considerably less favoured by the relatively closed nature of the Canadian policy structures than are the fully institutionalized groups.[57]

The study by the Law Reform Commission of Canada on public participation in the administrative process also concludes that many groups have been exluded from the decision-making process:

> ...while some special interest groups in Canada have always enjoyed access to government authorities. this access remains substantially restricted; it is not shared with the majority of interested groups and individuals in this country. It remains to be seen if independent agencies in Canada will choose to develop public participation and thereby ensure better regulation "in the public interest"[58]

As noted earlier, some changes have occurred to make decision-making a more open process. There are more parliamentary committees, more public hearings and task forces which hold policy deliberations up to public scrutiny. Much of the credit for this can be given to public interest groups and their advocates. Pross summarizes the changes in this way:

> changes in pressure groups. therefore, have produced additional developments in the political process. They have provided for more information, more expert opinion and greater clarity in the policy-making process

However, he is less optimistic about the degree to which the outcomes of policy-making have been affected:

> the changes which have taken place have more to do with process of policy-making than with the outputs of these activities, especially the allocative outputs. The latter have not been affected in a radical way. This is to be expected. however, since the alterations to the policy-making process were designed primarily to redress the inbalance between the executive, bureaucratic and legislative branches of government not to bring about a new pattern of policy outcomes.[59]

In other words, public interest groups may appear to be having a greater impact on public policy in this country than is actually the case. This is because the increased number of public forums which exist and the high profile media coverage which is sometimes generated do not necessarily translate into policy change. The actual impact on policy may be the result of factors which are less obvious such as an ability to ferret out the appropriate decision-makers and the relationships which are developed with those who set policy.

3. Development and Use of Advocacy

One is hard-pressed to think of a recent publicly debated policy issue, where the impetus for the debate has not come from a public interest organization or other type of community group. Drunk driving. pornography, prostitution, disposal of toxic wastes, etc. -- all have become controversial because individuals who were concerned about a problem organized with the specific purpose of creating changes in government policy.

The rate at which public interest organizations are formed in Canada is impossible to determine. There is little or no evidence of a decline despite the reduction in the availability of Federal government grants which assisted the activities of many community groups during the early to mid-70's. A survey of articles reporting on public interest issues in the Vancouver Sun and the Globe and Mail which I conducted over a two month period in the fall of 1983 found reference to over 10 groups which had been formed in the period immediately preceding the coverage. Considering the small sample size and the number of organizations which would not receive media coverage, this suggests that a significant number of new organizations are constantly appearing.

It is equally difficult to establish how frequently groups dissolve. Where an organization is formed around a specific issue, it will generally lose momentum once the issue has been resolved one way or another. On the other hand, an organization with broader objectives will survive as long as it has a committed membership and financial support.

Despite the difficulty in estimating the number of public interest organizations which are in existence and the rate at which they are formed or disbanded, there is no question that they are an established part of the political process. Their involvement in regulatory hearings and public inquiries, their pronouncements in the media and their participation in the parliamentary process are now established.

Earlier in this chapter, the effect which accessibility to decision-makers had on the ability of a group to achieve its objectives was discussed. There are also a number of other factors which play a role in determining the success of an organization. These include:

- the objective of the group and the nature of the issue(s) involved

- the membership -- that is, whose interests are being represented

- maturity of the organization, including its access to funding and services

These characteristics also affect the ability of an organization to retain or otherwise enlist the assistance of lawyers in conducting legal advocacy.

In the following section, I consider the scope of activities and use of advocacy in relation to the following categories of public interest and community groups:

a. Consumer

b. Environmental

c. Civil Liberties

d. Anti-poverty

e. Disabled

Although these categories are not exhaustive, they are to a certain extent representative and therefore allow some understanding of the activities of such organizations in Canada and their use of public interest advocates.

a. Consumer

As discussed in Chapter III, the first consumer organization in Canada, the Consumers' Association of Canada, was formed in 1947. However, it was not until the 1960's that membership in the organization broadened and advocacy activities were undertaken in a systematic way. Since that time, consumer groups have formed in every region of Canada. An inventory of these groups, conducted for Consumer and Corporate Affairs, identified more than 300 such groups across the country.

Consumer issues are by their nature concerned primarily with the area where government interacts with the private sector. Where a particular activity such as utility rate-setting is under regulation, a natural forum is created for consumer groups. For example, the CAC has been able to use advocates before the CRTC to ensure better telephone service and lower rates for consumers in a number of jurisdictions across Canada.

Even where an industry is not under the specific control of a regulatory agency, the main strategy of consumer groups is to use government to bring activities which harm consumers under control. An example of this is found in Appendix II in a story entitled "Pop controversy still fizzing" (Vancouver Sun, October 26, 1983). This article describes the hazards of exploding 750-millilitre pop bottles and the efforts of the Consumers Association of Canada to have Consumer and Corporate Affairs require manufacturers of soft drink bottles to produce safer containers.

Because consumer issues involve a small degree of harm spread over a large number of people, few organizations are formed which are issue specific. Those that are created generally involve damages toan individual which are quite large. In those situations, such as in the recent Urea Formaldehyde Foam Insulation controversy, it may even be difficult to classify such organizations as public interest, because the motivation for formation is primarily or exclusively the protection of a private interest.

Consumer organizations which have broadly defined objectives, such as the CAC, likely gain much of their support because of the informational services they provide. In a U.S. study by a consumer group, it was found that only 9% of the membership renewed their subscription because of a desire to "help support an organization that speaks for the consumer.[60] As well, as Jonah Goldstein noted in his analysis of the CAC[61], people are often unwilling to commit themselves either financially or by donating time when the objectives are diffuse and when the individuals who belong do not have strong collective goals. The CAC appears to have combatted this problem in recent years by consciously moving away from lobbying politicians behind closed doors (as the only strategy) and endeavouring to keep a high profile through interventions in regulatory hearings and contact with the media.

Whatever the reason for support is, it is evident that consumer groups can attract members. The CAC currently operates on a $3 million budget, 80% of which is obtained through membership. Another consumers group, the Automobile Protection Association in Quebec operates on a $1/2 million budget, 88% of which comes from membership.[62]

Despite the size of the CAC budget, it has not been able to fund its advocacy activities directly. Although it is one of the few Canadian public interest groups to employ staff lawyers, funding for the Regulated Industries Programme comes from Consumer and

Corporate Affairs, not from membership fees. As well, CAC has successfully obtained costs for lawyers and expert witnesses from the CRTC. One important reason why funds must be solicited from outside sources is the tremendous cost of participating in a regulatory hearing on a somewhat equal basis with the industry that is being regulated. The CRTC commented on this problem in its Telecom decision in 1978:

> ...if the objective of informed participation in public hearings is to be met, some form of financial assistance must be made available to responsible interveners, both active and potential, who do not have sufficient funds to properly prosecute their cases, particularly where such interveners represent the interests of a substantial number of subscribers. The complexity and the importance of the issues which come before the Commission often demand that expert resources be available for their adequate treatment. Such resources are employed by the regulated companies. In the Commission's view, it is critical to, and part of the necessary cost of the regulatory process that such resources be available to responsible, representative interveners.[63]

As is suggested by these comments, costs against the applicant are awarded to CAC because it is recognized that, in addition to their members, they also represent many others who do not participate directly in the organization.

There is no question that consumer groups will continue to play an important role in regulatory hearings. Andrew Roman, general counsel at the Public Interest Advocacy Centre noted that public interest involvement in hearings before tribunal such as the CRTC is becoming increasingly sophisticated and, as a result, is having important impacts on both the process and outcome.

The results which Mr. Roman describes are dependent on counsel being available on a continuing basis through staff counsel or other assured source of legal counsel such as PIAC, as well as costs being provided by the tribunal. If funding is reduced for public interest advocacy or if costs provisions are removed, the contribution of consumer and other groups would be severely restricted.

Consumer advocacy in Canada is developing in other areas as well. Ken MacDonald, who is staff counsel with the CAC and oversees the Regulated Industries Programme, explained that many areas which require attention simply haven't been explored because the resources aren't available to do so. Some of the priorities which CAC has set for the near term include anti-dumping provisions, marketing boards and inter-provincial bus transportation.

Staff counsel at VCLAS suggested that another issue which consumers will be involved with in the coming years is that of informational security and access to personal files. With the ever-increasing use of computers and with financial data on individuals being collected by credit agencies and government, this subject will likely be brought before policy-makers and possibly the courts by consumer groups in the near future.

b. Environmental

Environmental groups appear to be by far the most abundant type of public interest organization. In a survey of 164 public interest organizations in Canada, over 25% could be considered to have environmental protection as an objective, not including those which were concerned with related issues such as nuclear power and preservation of agricultural land.[64] This point was also made during the 1977 "Canadian Conference on Public Participation". In the proceedings of that conference, the following was stated in the preface:

> Much of the discussion in the papers revolves around a central theme of social concern about the environment. Nowhere is the demand of citizens for a greater say in government decision-making more apparent than in this broad policy area.[65]

Although the heyday of environmentalism is considered to be at least a decade old, there is little evidence of a decline in either the number of groups concerned or the media attention paid to these issues. As well, general support for environmental protection is still extremely high.[66]

It appears, however, that few organizations with broad objectives are now being formed. Groups such as SPEC, Energy Probe, Greenpeace, STOP, Ecology Action Centre, etc. which were formed across Canada during the early to mid-1970's are generally still in existence. By contrast, this decade has seen the formation of coalitions on specific issues such as acid rain, development of the Beaufort Sea, clean-up of the Great Lakes, etc., as well as the creation of groups concerned with a local environmental problem, with membership that is community-based rather than philosophically or politically based.[67]

A large proportion of issue-oriented environmental organizations have been able to fund their activities independent of government or private sector support. By contrast, many of the more mature organization have developed contacts within the Federal bureaucracy and are able to finance at least a portion of their activities from government grants.

The funds raised through membership or government programs (which are usually employment-oriented), are inadequate to retain the services of expert witnesses or legal counsel. Without the availability of these resources, environmental groups have difficulty achieving the same level of credibility as those proposing environmental damage, who are generally well-armed with consultants' reports and lawyers. This is particularly true in public hearings which are adversarial in nature. As David Estrin commented at the "Canadian Conference on Public Participation":

> Despite statutory participation procedures and the "ad hoc" tribunals ... many of the hearings are, for the public, little more than a sham. The proponent comes to the hearings having spent years and perhaps hundreds of thousands, if not millions, of dollars hiring experts and obtaining massive reports to convince the tribunal that its project is worthy. On the other side, persons opposed or who simply wish to ensure that all the facts are before the tribunal usually have neither the resources to examine adequately and respond to such technical preparation nor the resources to appear at the hearing through counsel.[68]

The situation has changed little from 1977, when Estrin's comments were made. Some tribunals, such as the B.C. Utilities Commission in the recent Site C Dam Hearings and the Environmental Assessment Review Panel considering the Beaufort Sea development have made cost awards to environmental groups recently. However, these are the exceptions and it now appears that the costs provisions for the B.C. Utilities Commission have been removed.

Public interest law firms which specialize in environmental issues exist in Toronto, Vancouver and Alberta (although the Alberta Environmental Law Association isn't allowed to represent clients). However, these firms have limited resources and can only operate in localized regions of the country. Where these services aren't available, environmental groups either utilize provincial legal service organizations or do without legal advice in undertaking advocacy. For example, in Christine Wihak's survey of 10 B.C. environmental groups, she found that 60% of the groups encountered difficulties in obtaining legal advice.[69]

As mentioned earlier, many environmental issues are now raised by ad hoc groups with very specific objectives. The more established organizations also use public advocacy effectively; however, because of staff and experience, they are able to combine these tactics with legal advocacy and lobbying.

Some of the issues prominent in the media recently are also issues which Marilyn Kansky and Toby Vigod, staff counsel of WCELA and CELA respectively, have identified as the major environmental concerns of this decade. These include the contamination of drinking water from pesticides, toxic wastes and industrial pollution (including acid rain), the transportationa and disposal of hazardous substances, commencement of private prosecutions where government officials have failed to enforce existing statutes, disclosure of research information which supports the registration of pesticides and the environmental impacts which are associated with major energy projects and transmission facilities.

Other issues which have generated a large amount of public support as well as controversy include the protection of animals such as seals, wolves and laboratory test animals and the opposition to nuclear power plants.

c. Civil Liberties

While consumer groups are primarily concerned with the intersection between government and industry, civil liberties organizations focus on the interaction between government and the individual.

The majority of these organizations, which include human rights groups, have broad objectives and have been in existence for more than a decade. Although a few organizations were formed prior to 1967 in response to specific issues -- for example, corporal punishment in the schools -- existing groups were largely set up after that date through the financial support of the federal and provincial governments or by initiation of existing associations.[70]

The 20th Anniversary of the Universal Declaration of Human Rights in 1967 provided the impetus for both levels of government to undertake special projects in the area of civil liberties. With funding from the Secretary of State, conferences took place across the country to plan events for the International Conference on Human Rights. As a result of these organizing activities, seven human rights organizations were formed.

The Canadian Civil Liberties Association was formed in 1965 in Toronto from the defunct Association for Civil Liberties. Commencing activities in 1967 largely through private foundation funding, the CCLA began chapters in a number of communities across Canada, five of which were still in operation in 1972. A general staff counsel has been retained by the CCLA since 1968 and funding for its activities is received primarily through membership fees from its 5500 members (it is unwilling to accept government funding).

Today, at least one civil liberties organization exists in every province. Those groups not affiliated with the CCLA formed a national association in 1972, the Canadian Rights and Liberties Federation. As well, many other human rights groups have developed during the last decade with both broad and specific objectives. The National Black Coalition was established in Ottawa in 1969 and is currently funded through a grant from Secretary of State and through its membership.

Because of their continued involvement in civil liberties issues over a relatively lengthy period of time, these groups have generally developed some rapport with policy-makers. For example, as described in Chapter III, the B.C. Civil Liberties Association was invited by the provincial government to take part in developing a new Police Act. As well, access to legal counsel has often been obtained by asking lawyers to sit on special committees or by asking sympathetic members of the bar to donate their services to a particular action.

Financial support for civil liberties organizations across Canada is usually obtained through a combination of membership fees and donations and government grants. A report done in 1972 for the Secretary of State underscores the difficulty which these groups have had in maintaining a solid financial base:

> If there is one common denominator among civil libertarian organizations, it is definitely the lack of funds. The B.C. Civil Liberties Association is one of the strongest and most active associations in Canada, yet it suffers as the others do from a lack of financial resources, a lack that hinders their level of activity.[71]

The situation does not appear to have improved since that time. An article in the Vancouver Sun dated October 8, 1983 contains the following quote from President of the B.C.C.L.A., Reg Robson:

> the association will have to lay off its office staff of three "and discontinue our operations completely in 1984" unless it can raise more than $40,000.00

Civil Liberties organizations in Canada are involved with a wide range of issues. For example, during 1982, the B.C. Civil Liberties Association took positions on such matters as prostitution, use of social insurance number, involuntary sterilization of the mentally handicapped, expropriation, mandatory retirement and a constitutional property rights amendment.

The proclamation of section 15 of the Charter of Rights in 1985 will provide these organizations with an important new tool.

Previously, legislation which offended civil liberties could only be challenged on a constitutional basis -- that is, that the level of government introducing the legislation did not have the necessary jurisdiction under the BNA Act. S. 15, which bans discrimination based on sex, ethnic origin. religion, race. mental or physical disability, will allow the courts to strike down any legislation which offends this provision of the Charter.

A recent article in the Canadian Bar Association's "National" described how s. 15 would be used by the Canadian Advisory Council on the Status of Women to strike down sex-biased legislation:

> Cases will be sought where the discrimination is clear-cut and blatant where the legal issues are simple. Plaintiffs will be sought who are sympathetic. whose plight will catch the imagination, and who are resolved to stay with their case through to final appeal decisions. ...
>
> Hot spots of potential litigation quick to emerge were the criminal law, family law and children. the Indian Act, the Income Tax Act, pensions and unemployment insurance.[72]

This route will also be available to civil rights groups to attack legislation that is racist or discriminatory in other ways.

d. Anti-Poverty Organizations

There are comparatively few public interest organizations in Canada which have poverty issues as a focus for their activities. This is not to suggest that there are few Canadians who are directly affected by poverty. Rather, it emphasizes the obvious limitations on time and money which those who are economically disadvantaged have.

In addition, the anti-poverty community organizations which do exist are primarily oriented to providing services to individuals rather than advocating law reform or participating in regulatory hearings.

Anti-poverty groups and other organizations which represent the interests of the disadvantaged, share several characteristics which distinguish them from consumer and environmental organizations:

- the membership often has immediate needs which serve to set the priorities of the organization
- members of the group rarely have political power or access to power because of the socio-economic position they occupy

- the issues they are concerned with generally involve the economic structure of society in a very direct way and thus are more threatening to other interests in society than are value issues

These factors have affected the impact which anti-poverty groups have had on the decision-making process. Jim Lorenz, a U.S. poverty lawyer, observed that:

> Our work has impact when the client groups we represent are perceived as having some political power. when the cases which we handle for our clients succeed in arousing public sympathy for those clients and indignation against our opponents and when the cases are supported by middle class groups, such as the trade unions which do have political power.[73]

Few of the public interest organizations which were formed at the beginning of the 1970's had poverty-related objectives. In an analysis on policy-making conducted for the Canadian Council on Social Development in 1978, Henry Chapin and Denis Deneau commented that:

> To a major extent, governmental support of citizen organizations advocating on behalf of disadvantaged Canadians came about because low-income and minority groups were not organized effectively to express their concerns to government.[74]

Although the authors discuss initiatives taken by the federal government to open up the decision-making process at the beginning of the last decade , they do not mention any specific measures taken to encourage the formation of groups promoting the interests of the disadvantaged.

One organization which was formed during that period is the National Anti-Poverty Organization which has chapters across the country. NAPO was formed at a national "Poor Peoples Conference" held in 1971. The Ottawa staff of three is funded through government grants and membership fees. while other offices are generally run by volunteers. NAPO has lobbied federal and provincial politicians regarding a variety of policies which affect low-income people. including unemployment. restrictive welfare regulations. and the need for a guaranteed annual income. As well. it has participated in regulatory hearings such as CRTC Hearings on telephone rates and B.C. Utilities Commission Hearings to set provincial electrical rates. In these hearings. NAPO has been represented by legal counsel provided by the Public Interest Advocacy Centres in Vancouver and Toronto.

In B.C., a coalition of 29 community groups which provide services to the disadvantaged has been formed under the name of the Federation of Anti-Poverty Groups. The FAPG has no paid staff at this time and uses the services of PIAC. Legal Aid or the Vancouver Community Legal Assistance Society when legal advice is required. For instance, VCLAS has represented the FAPG in B.C. Telephone rate hearings. They have been involved in some advocacy, including recent participation in the coalition to lobby against provincial government cut-backs. However, they are primarily concerned with providing a support system for member groups.

Because most anti-poverty groups which exist are more concerned with providing services than with undertaking law reform or other advocacy activities. and because the majority of poor are unorganized. the lawyers which provide legal services to the disadvantaged have also been responsible for initiating actions with broader policy implications. For example, several of the anti-poverty groups which responded to Christine Wihak's questionnaire on public legal information indicated that they used the Vancouver Community Legal Assistance Society or Legal Aid as referral agencies. It is VCLAS which initiated the class action to prevent B.C. Hydro from requiring deposits from those with lower incomes (described in more detail in Appendix I). As well, VCLAS took a referral from a community law office in Smithers and was successful in obtaining the right of those claiming Workers' Compensation to look at their medical files.[75]

The Charter will also provide new approaches for those conducting advocacy on behalf of the poor. Already, the Public Interest Department of Legal Aid Manitoba has used proclaimed sections of the Charter in several important cases:

- challenge of pre-trial detention at the Winnipeg Remand Centre, where facilities are inadequate, based on sections 7 and 12 of the Charter

- action against Stony Mountain Institute. based on sections 7 and 12. regarding double-bunking of prisoners (this is a national test case on the issue of overcrowding in penitentiaries)

- a section 7 application to enjoin the closing of a school in a primarily native community

Advocacy for the disadvantaged has been significantly advanced in situations where specialized services have been provided. For example, as a result of the Farmworkers Legal Services Project which was set up in B.C. in 1981. living and working conditions for farmworkers have become a major issue and significant changes in legislation have taken place. Without these services. it is unlikely that this problem would have achieved such a profile or that law reform would have occurred. Similarly, the Public Interest Department in Manitoba has provided services which probably would not have been offerred through other agencies. In one case involving expropriation of a small inner city neighbourhood, they were able to represent tenants and homeowners before a commission of inquiry, forcing the government to adopt an alternative plan for the community.

e. Handicapped

In some respects, handicapped organizations have similarities with anti-poverty organizations. Their membership is often largely disadvantaged and a significant proportion of organizations exist primarily to provide services to a targetted group of people. However, there appear to be many organizations which have a substantial advocacy component as well. For example, in an inquiry recently held in Ontario regarding the access of legal services to the disabled, the inquiry Commissioner, Judge Abella, concluded that:

> On a number of levels, legal services were seen as crucial.... Through informed advocacy, governments could be encouraged to change or expand services. And through the legal process, rights could be further defined and developed in the courts.[76]

As well, the survey of B.C. organizations representing the handicapped conducted by Christine Wihak found that half of those polled considered advocacy to be an important part of their activities.[77]

One of the reasons for this may be that it is possible to define more precisely some of the changes in legislation or policy which are required to improve the participation of the handicapped in society. As well, many of the issues raised by the disabled involve the infringement of civil liberties and therefore tend to have more public support than poverty issues.

Some handicapped groups have made effective use of volunteer lawyers. As described in Chapter III, the British Columbians for Mentally Handicapped People has undertaken advocacy for the last decade through a Legal Task Force. Several of the groups contacted by Christine Wihak, including the Physically Handicapped Action Committee and the Disabled of the South Peace, also mentioned use of volunteer lawyers.

Specialized legal services for the handicapped have been developed over the last 5 years in various parts of the country. The Mental

Patients' Advocate Project was set up in B.C. in 1977, through funding from the Law Foundation and Justice, to provide free legal advice to mental patients.

In Ontario, the provincial government's Clinic Funding Committee began funding the Advocacy Resource Centre for the Handicapped in 1980. ARCH is the first legal clinic in Canada to provide services exclusively to the handicapped and disabled. Its priorities are set by a Board of Directors who represent 23 handicapped groups from across the province. In Ottawa, the Research Education and Advocacy Centre has been established to provide a network of lawyers who will act for the handicapped on a pro bono basis.

At the national level, two organizations are involved in promoting advocacy on behalf of the handicapped. CLAIR or the Canadian Legal Advocacy Information and Research of the Disabled was established in 1981 to assist those delivering legal services to the disabled, although it provides no services directly. The Canadian Association for the Mentally Retarded employs a staff counsel who undertakes advocacy, as well as referring cases to outside counsel.

Handicapped organizations are also able to obtain assistance from legal aid programmes. In B.C., many of the groups which were contacted during Christine Wihak's survey indicated that they were able to obtain assistance from the Legal Services Society when necessary. However, since that survey was undertaken, several community law offices around the province have been closed, exacerbating the difficulty in obtaining advocacy services from a legal aid office which Judge Abella observed in Ontario:

> Although general community legal clinics have expressed an interest in becoming more involved with the legal problems of the handicapped and the disabled, there are factors which limit the ability of the clinics to assume a primary role for the delivery of these legal services. At present, virtually all legal clinics are operating at the very limits of their capacity. Caseloads have so burgeoned that in many clinics there is simply no capacity to take on significant amounts of extra case work.

Despite the recent increase in services to the handicapped and the important role which many disabled groups assign to advocacy activities, the existing level of legal assistance is clearly not adequate. In the groups surveyed by Christine Wihak, 40% reported difficulties in getting necessary legal information. Judge Abella found the situation in Ontario to be intolerable, despite the highest level of services for the handicapped in Canada. In her report, she concluded that:

> ...even taking into account the contribution of the private bar, the existence of the specialist legal clinic for the handicapped, the network of other legal clinics and services across Ontario, and the existence of the Ontario Legal Aid Plan it is nonetheless true that delivery systems for legal services for the handicapped remain dangerously partial and fragmented.[78]

The need for advocacy services on behalf of the handicapped is not likely to diminish in the near future. It is Judge Abella's opinion that the Charter "has potentially a very significant role to play in advancing the rights of the handicapped and disabled. However, she suggests that the laws will have to be changed to allow class actions and other general litigation involving rights before the Charter can be effectively utilized:

> The litigation experience in the United States involving the rights of the handicapped has been most revealing. It was only when substantive rights were coupled with effective legal procedures that significant progress was made in the courts....
>
> reform of class action procedures will be vitally important to the handicapped, particularly insofar as litigation under the Charter of Rights and Freedoms is concerned[79]

Two cases in 1983 involving Justin Clark and Stephen Dawson (described in Chapter III) have focussed public and therefore political attention on the rights of the handicapped. It is likely that these actions will cause handicapped organizations in Canada to consider legal advocacy in situations where it hasn't been used before.

B. Emerging Public Interest Issues

INTRODUCTION

In the following section. I identify some of the prominent public interest issues which have recently surfaced in Canada. This analysis is based on conversations with lawyers who practice in the area[80] and recent media coverage of public interest issues.

It is interesting to note that in all of these issues. the Charter plays or is likely to play an important role. As well, those involved have been able to mobilize a tremendous amount of public support. This has provided at least some of the resources necessary to undertake legal advocacy.

1) Cruise litigation

Anti-nuclear organizations in Canada moved quickly this year to argue the Charter in attempting to prevent testing of the cruise missle in Alberta. Using section 7, Operation Dismantle, a coalition of organizations promoting nuclear disarmament brought an action in Federal Court against the Cabinet decision to allow cruise testing. The Federal government argued that the courts did not have the right to review Cabinet policy decisions and that the action should be dismissed.

This argument was rejected at the Federal Court level; however, it was appealed to the Federal Court of Appeal which dismissed the action, not because it was unwilling to review a Cabinet decision, but because the statement of claim failed to disclose a breach of secion 7, in that it did not allege any identifiable deprivation of "life, liberty or security of person." That decision was upheld by the Supreme Court of Canada.

The Cruise litigation may prompt future reviews of Cabinet under the Charter, as some writers suggest that the courts will be willing in appropriate circumstances to review such policy decisions. In the December. 1983 issue of the "National", Kenneth Swan makes the following observation:

> ...there are sound reasons for a free and democratic society to consign a substantial independence to the executive in areas of national security and international relations. But our courts, and English and American courts as well, have properly intervened in the past in both of these areas, and

should be prepared to do so again if Charter guarantees are at risk. The careful articulation of when the Charter will permit the courts to decline to do so will be an important cornerstone of our political system.[81]

2) Women's issues

The last year has also seen an effective law reform and legal advocacy strategy implemented by women's organizations. Major public debate, as well as significant policy and legislative changes at all three levels of government have occurred on such isues as:

- Charter of Rights: a successful lobby to entrench sexual equality under Section 28 of the Charter
- pornography: as a result of pressure from women's groups, provisions of the Criminal Code regarding pornography have been enforced. As well, a number of municipalities have attempted to restrict the distribution of pornographic materials
- wife-battering: The Ontario government has yielded to pressure to combat wife-battering and is implementing a number of measures, including the funding of emergency shelters and transition houses, research and community projects and a major provincial conference
- sexual offence provisions under the Criminal Code: major alterations to the Code took place over the last year including a change in the approach to rape. This occurred primarily as a result of a lobby by women's organizations. As well, the Minister of Justice has introduced a bill which will, amongst other things, expand the definition of obscenity to prohibit representing anyone in a degrading way that unduly exploits sex, crime, horror cruelty or violence.

In addition, as described earlier in this chapter, s. 15 of the Charter will be used to systematically attack discriminatory legislation when it is proclaimed in 1985.

In the preface to a book describing the lobby to include section 28 in the Charter, Rosemary Billings describes the use of advocacy by women's organizations:

> More and more, therefore, lobbying ... has become a familiar tool of the women's movement. Although largely unproductive

> in proportion to the amount of energy expended. lobbying has at least familiarized women with the corridors of power, created networks across the country and ... created lengthy policy agendas that are agreed to nation-wide as the action priorities.[82]

3) Victims of Crime

It was the opinion of VCLAS lawyers that victims of crime will organize to a greater extent to obtain harsher penalties and more compensation from the Federal Government for the damage caused by criminal acts. One example is the Mothers Against Drunk Driving which convinced Justice Minister Mark MacGuigan to introduce a bill which would:

- allow blood tests to be taken from unconscious drivers
- raise penalties for impaired offences
- raise the maximum sentence for dangerous driving from 2 to 6 years, and where death or injury is involved to 14 and 10 years, repectively

4) Aboriginal Claims

Indian organizations have recently used advocacy to protect their traditional rights from proposed resource developments such as:

- herbicide spraying in Nova Scotia
- development of the James Bay hydroelectric project
- oil sands extraction in Northern Alberta
- Site C dam in north-eastern British Columbia
- offshore oil and gas development
- Norman Wells pipeline

As well, a strong national lobby was developed to entrench aboriginal rights in the Charter.

As a result, advocacy can be anticipated on a number of levels in the near future with respect to land claims and the development of self-government.

CHAPTER V

CAN EXISTING LEGAL SERVICE ORGANIZATIONS MEET ADVOCACY NEEDS?

INTRODUCTION

Public interest advocacy has been much slower to emerge as a priority for legal services in Canada than in the United States. There are a number of reasons for this difference:

- existence of a constitution with which to enforce rights, as well as far more liberal court rules regarding standing and class actions. This has meant that the courts were used by public interest advocates in the U.S. at a much earlier stage
- the War on Poverty in the mid-60's resulted in the establishment of legal aid offices which had reform of structures causing poverty as a major priority. The successor to these offices, the LSC, also developed law reform as the primary focus of activities. By contrast, few legal aid programs in Canada (at least until recently) were concerned with more than providing basic legal services to the disadvantaged
- public interest organizations in Canada generally did not consider advocacy activities to be important until the last decade

Several developments have occurred in the last decade, however, which have permitted an increasing role for public interest advocacy in this country. The first major change was the move from a legal aid system dominated by judicare to the legal services approach by several provinces in the early to mid-1970's (the difference between legal services and judicare is discussed in Chapter III at page 31). This allowed lawyers to specialize in particular areas of the law concerned with the disadvantaged and to undertake test litigation or law reform where there was an obvious need for a change in law or policy.

At approximately the same time, several public interest law firms were formed -- the Canadian Environmental Law Association, the Public Interest Advocacy Centre and the West Coast Environmental Law Association. In addition, the Consumers Association of Canada received funding from the Federal Government to operate its Regulated Industries Program. The mandate of the lawyers working with these organizations was primarily to provide advocacy services in the environmental and consumer areas. Since their formation, one new Environmental Law Association and two PIAC offices have been opened.

At the end of the 1970's and the beginning of this decade, legal service organizations with specifically targeted communities have been established, largely in response to the inability of existing general legal service offices to adequately address the problems of those communities. For example, Ontario set up a network of clinics such as ARCH, Metro Tenants Legal Services, etc. In B.C., special clinics were established to handle concerns of prisoners, mental patients and farmworkers (the latter two with minimal provincial funding).

The most recent development is the creation of the Public Interest Department in Manitoba. The PID is funded by the provincial legal services programme with some financial support from the Department of Justice and takes referrals from other legal service offices in the province. Its staff lawyers exclusively handle public interest cases, based on priorities set by the Manitoba Legal Aid Board.

Despite the recent growth of legal services designed to provide public interest advocacy, it is evident that what is provided falls well short of needs. For example, in B.C., which has an environmental law association, a public interest advocacy centre, community legal service offices and specialized clinics such as the FLSP and VCLAS, Christine Wihak found that 60% of environmental groups surveyed had difficulty obtaining information about legal solutions. The FLSP has also made it apparent how neccessary it is to have lawyers with specialized knowledge providing advice about law reform. Without the availability of that kind of advice, many interests are simply unaware of legal problems which must be remedied.

Ontario, which has the most extensive system of community clinics in Canada, is still not able to meet either the individual or advocacy needs of disadvantaged groups in society. Judge Abella, in her examination of legal services for the handicapped, made the following observations:

> even taking into account the contribution of the private bar, the existence of the specialist legal clinic for the handicapped, the network of other legal clinics and services across Ontario, and the existence of the Ontario Legal Aid Plan, it is nonetheless true that delivery systems for legal services for the handicapped remain dangerously partial and fragmented.... There are currently legal needs in this community which go totally unmet, and perhaps more extensively, legal problems which go unrecognized as such because there is no ready access to legal advice and assistance.[83]

The need for increased advocacy services was also raised by a number of speakers at the People's Law Conference. For example, in the workshop on "Looking for New Solutions", Ron Ianni stated that:

> ... In every province, there should be a fund available so that people can, on a public-advocacy or public-interest basis, challenge a law that is not working the way it should and get it changed. I don't think that should be at the expense of any one individual. It really is the responsibility of a whole group.[84]

Speakers at the Conference also emphasized that some accessibility to lawyers was also required to allow citizens an opportunity to participate in the legislative and judicial process:

> People who have an issue should not avoid lawyers, but should teach lawyers what it is they need. We have a legal system that requires translators, and the translators are the lawyers. They will work better for you if they understand what you are trying to get across.
>
> ...Je voudrais souligner que le systeme judiciaire, c'est pas "legal aid". Ils ne veulent pas vraiment, avoir la participation des citoyens comme chien de gard. parce qu'il y a encore un grand trou entre la population et le systeme judiciaire.[85]

In addition to existing needs which go unmet, it is likely that the increasing use of advocacy by public interest groups, the greater availability of the courts through the Charter of Rights and reforms to restrictions on the use of class actions will make the need for specialized services for public interest representatives far more apparent.

It is clear from the success of the public interest law firms and more recently of projects such as the Farmworkers Legal Services Project, Advocacy Resource Centre for the Handicapped, and Manitoba's Public Interest Department that the most effective law reform and participation in the administrative process will occur where lawyers have the time to specialize and to familiarize themselves with the concerns of their clients. A writer in the Yale Law Journal recently expressed this important point in the following way:

> In order to represent their client groups effectively, public interest lawyers must try to provide the same type of continuous assistance that corporate counsel provide to their clients.[86]

In the remaining portion of this chapter, I assess the various options available to provide advocacy services. In particular, I consider their ability to meet the existing and future demand for public interest advocacy and their capacity to provide the specialized services which are required. The following approaches are examined:

A. Pro bono Services Undertaken by the Private Bar

B. Judicare Model of Legal Aid

C. Legal Services Model

D. Legal Service Clinic

E. Public Interest Law Firm

A. Pro Bono Services

The pro bono model can be effective in certain situations. Where a mature organization is involved which can locate lawyers willing to volunteer their time and which can provide specific direction, where the lawyer can gain specialized knowledge by committing time and energy on an ongoing basis to the group (e.g., by taking part on committees) and where regular legal assistance is not required, a lawyer in private practice can provide a valuable service to a public interest or community organization.

If these conditions are not met, any number of the following factors can combine to ensure that public interest representatives are poorly served by a volunteer lawyer:

- an organization may not be able to find a sympathetic lawyer
- lack of experience in the relevant area may mean that legal solutions are overlooked or appropriate government agences are not contacted
- a strategy may be proposed that is inappropriate for the needs or goals of the organization
- a lack of fees may mean that the case receives lowest priority

This is not to downplay the efforts of individual lawyers who are willing to take initiative and become involved with organizations seeking to redress social inequities. For example, several lawyers in B.C. have recently donated substantial amounts of their time to assist Indian organizations in settling land claims issues. However, such lawyers represent a very tiny fraction of the total bar and therefore cannot be expected to meet more than a small proportion of the existing need for advocacy services.

B. Judicare Model of Legal Aid

The judicare model is designed very specifically to deal with individual problems rather than addressing larger societal or group problems. There is no incentive (financial or otherwise) for an individual lawyer to look beyond the needs of the immediate client, nor to develop skills which are necessary to undertake law reform or test litigation. As Dick Gathercole stated in "Lawyers and the Consumer Interest":

> While there have been some effective law reform achievements in the United States, little has been accomplished in Canada and the U.K. This is partly the result of the emphasis on the Judicare model of legal aid in these countries[87]

The problems outlined above are compounded by the very limited funding which is provided to legal aid programs in most places in Canada. This ensures that only a narrow range of cases are actually handled through the judicare system.

C. Legal Services

Legal service programs in many provinces received initial criticism from the Bar because of their focus towards law reform and away from the more traditional lawyer-client service. It now enjoys general support, however, because of the increased work it has created for lawyers in private practice and because most of the work is in fact oriented towards individual clients rather than legislative or policy changes. Except for Quebec and perhaps Saskatchewan, legal service programs have not replaced judicare; rather, they have been used as a supplement to existing legal aid programs.

The legal services approach also appears to have the general support of provincial governments which have implemented them. Because they cover a broad range of services and undertake few activities which directly threaten the image of the existing government, they have not been the focus of funding cutbacks.

The characteristics of these programs which have gained them the support of the bar and provincial governments are also the reasons why they have been ineffective in undertaking law reform, test litigation or other activities which attack the root of the the problems which the disadvantaged face. They include:

* a caseload so broad that little specialization can occur

* a caseload so heavy, due to limited funding, that staff lawyers do not have the time to handle more than the immediate problems which come through the door. In addition, as Dick Gathercole points out in his article on legal services, "the evaluation of a legal services office is based on its caseload. This is easier to measure than more nebulous factors such as acceptance in the community, long-term interests of clients and law reform."[88]

As a result, legal service offices have only made a small contribution to public interest advocacy and are unlikely to expand their activities in this area unless a conscious move is made by provincial governments to change priorities of the programs and/or to increase funding.

D. Legal Service Clinics

Where provinicial governments have been concerned about the inability of legal service programs to meet the needs of the disadvantaged, including the advocacy services required, specialized clinics have been developed. Examples include Ontario's clinics for tenants and the handicapped and Manitoba's Public Interest Department. Where a province has been unwilling to provide funding, such clinics have also been developed based on support from other sources such as the Federal Government or Law Foundations. For instance, the FLSP in B.C. has operated on money from the B.C. Law Foundation and the Department of Justice as has the Mental Patients Advocacy Project (although it initially received some support from the B.C. Legal Services Society).

The advantages which these clinics have over legal service offices are readily apparent:

- staff lawyers are able to develop an overview of the broader problems which their clients face and thus are in a better position to identify where law or policy reform is necessary

- an intimate acquaintance with the existing administrative structure in a particular area can be gained

- increased staff time can be spent in research and preparation of briefs because of the more narrow mandate of a clinic

- lawyers with a commitment to providing services to a particular group are attracted to clinics and thus bring this extra enthusiasm to the job (this was evident with all of the clinic lawyers which I interviewed)

There are, however, limitations to this model which may interfere with a clinic's ability to address the advocacy needs of its clients, including:

a) vulnerability

Where funding for a clinic comes from one primary source, there may be reluctance to undertake litigation which may threaten that funding. For example, it is likely that had the B.C. government been supporting the FLSP, that support would have been cut off following the series of actions taken by that clinic to expose unfair provincial policies. This is particularly true where the target communities have little political support, such as the farmworkers or prisoners.

Clinics are also far more exposed than legal service offices because they operate individually, because they generally have one targeted clientele and because law reform and impact litigation forms a larger share of the overall services they provide.

This problem is recognized by most clinics, which seek to diversify their sources of revenue and thereby reduce their dependance on any one group. The Federal government has played a key role in acting as a second or third funding option, often moderating the influence of provincial governments, which are a frequent target of clinic litigation.

b) accountability

As clinics are more likely to act for individuals than groups (the situation with public interest law firms is the reverse), direction for public interest advocacy usually comes from a board of directors or the staff lawyers themselves. Where a board is appointed by the provincial government with little representation from those on whose behalf the clinic has been established, it is difficult to ensure that the priorities set are those of the target group. One organization which has taken steps to address this issue is ARCH. The board of this clinic, which is composed of representatives from 23 handicapped organizations in Ontario, establishes priorities and reviews cases where eligibility requirements are not met.

Given the fiscal restraint currently shown by most provincial governments across Canada, it is difficult to predict whether the use of clinics will expand, either in provinces in which they are currently operating, to encompass new constituencies, or in regions where they presently don't exist. In the absence of clinics, it is clear that the advocacy needs of the disadvantaged and public interest organizations will not be met through existing legal aid programs.

The Public Interest Department in Manitoba represents an efficient and economical model for permitting increased advocacy within a provincial legal service program, without the establishment of new clinics for targetted groups. By taking referrals from offices around the province, it is able to provide services throughout the entire region. As discussed earlier, it is also able to develop the necessary skills and knowledge to conduct advocacy and test litigation and to pass these back to the local offices through workshops and materials. Finally, because it is specifically mandated to conduct advocacy, its effectiveness will not reduced by the more immediate needs of individual cases.

E. Public Interest Law Firms

The Public Interest Advocacy Centre set out the principles on which it operates in its 1980 Annual Report:

1. Effort is concentrated on cases of major importance, to ensure high quality work and maximum impact
2. Priorities are established to develop expertise and to provide services comparable to "corporate clients on the other side"
3. Staff are encouraged to remain for a long period of time, again to provide expertise
4. Membership is not used as a base for funding, because of the resources this requires[89]

Generally speaking, this same approach has been used by the environmental law centres. Although the Canadian and West Coast Environmental Law Associations have developed fairly substantial memberships because of the newsletter service which they provide, the income from this source represents a small proportion of the total budget.

In the provinces where they are located, the public interest law firms have been responsible for the majority of consumer and environmental advocacy undertaken. Restriction of practice to these areas, which continue to enjoy general support from the public, has ensured that continued funding is available.

In addition, both the environmental law associations and the PIAC's have carried out innovative education and law reform programs which tend to draw support from all sides (including funding agencies). An example is the advocacy training workshops which are described in the following chapter. Both CELA and WCELA have also used the workshop approach to promote law reform. For example, CELA has held a series of roundtable conferences on handling of toxic substances. bringing together industry, government and public interest organization while WCELA organized a major pesticide conference at Simon Fraser University, again drawing together all parties.

The public interest law firms have also been able to maintain good relations with the bar in the following ways:

- ensuring that any clients which are able to afford fees are referred out to the private bar
- establishing lists of lawyers who are called on to provide assistance on a reduced fee or pro bono basis
- developing expertise in particular areas of practice, which is shared with other lawyers through legal education programs and publication of materials (e.g., Environmental Law Handbooks, Reporter, etc.)

It is unlikely that further such law firms will be established in Canada unless one or more private foundations decide to set the delivery of advocacy services as a priority (as the Ford Foundation did in the last decade). It is also improbable that the existing firms will move outside the consumer and environmental areas because of limited resources and because of the likely impact such a move would have on public support. However. in the areas in Canada where they exist, the public interest law firms are an extremely cost-efficient and effective means of delivering advocacy services to environmental and consumer groups. As well, because they provide services to organizations rather than individuals, the priorities which are established are more likely to reflect the needs of the community being served.

Broadly based organizations with staff lawyers, such as the Consumers Association of Canada have advantages similar to the public interest law firms. These include:

- cost-effective delivery of advocacy services
- development of experienced counsel in the area of concern
- direction for priorities from a broadly-based membership

SUMMARY

The most effective methods of delivering advocacy services are clearly the legal service clinics and the public interest law firms. In both the Federal Government has played a key role in providing financial assistance.

Given the current economic situation, it is unlikely that the provinces will be expanding advocacy programs. In some, even existing legal aid programs are being cut back. As a result, if there is to be any movement towards accomplishing the goal of equal access to justice and filling major gaps which exist in provincial services, federal initiative will have to be taken by directly rather than indirectly supporting advocacy programs.

CHAPTER VI

SHOULD PUBLIC INTEREST ADVOCACY BE A PRIORITY IN FUNDING LEGAL SERVICES

In the following chapter, I discuss the arguments which are often raised to support the subsidization of legal services for public interest representatives. As well, I examine what has been accomplished where advocates have been provided where such services had previously not existed. Finally, public reaction to advocacy activities is considered.

A. Why Fund Advocacy

The debate surrounding the funding of public interest advocacy has not necessarily been a high profile one in Canada, despite the changes in attitudes regarding openess and fairness in the decision-making process which have occurred over the last two decades. It often surfaces before regulatory tribunals or public inquiries which have the power to award costs or otherwise fund public intervention and it is a question which funding agencies such as Law Foundations must grapple with when deciding where to place limited funds. More often, however, it is indirectly decided when provincial governments allocate resources to their legal aid programmes or when they decide the forums, if any, around which public discussion of an issue will occur.

There are a number of reasons why there has not been greater public pressure for the provision of advocacy services. Firstly, some public interest groups are able to maintain a high media profile; that is, they are successful in their public advocacy activities and therefore appear to be making an impact. However, as discussed in Chapter IV, media coverage does not ensure effective legal advocacy -- that is, changes in policy or laws -- and may even cause decision-makers to avoid those with a public profile.

Secondly, there is a myth that public interest representatives do not require access to the full range of services enjoyed by the private sector. Because they are not self-interested, they are satisfied with less. For example, a Toronto Star article on the Canadian Civil Liberties Association begins in this way:

> Cardboard boxes litter the floor, topple over and disgorge their contents on a dirty chipped linoleum floor. They're joined by dusty reports and yellowing newspaper clippings that have long since given up the battle to stay on top of the battered desk or the metal bookcase leaning against the wall. Two grimy windows covered in garish turquoise curtains that match the peeling paint look out at the flashing neon sign of the Eaton Centre. A montage of newspaper clippings, a faded songsheet of Solidarity Forever and three snapshots taped haphazardly to the wall are the only efforts at decoration here.[90]

The tone set by this article would certainly be damaging if it were describing a new company. Yet it seems somehow fitting that a public interest group should be operating under these conditions. (The same kind of attitude also seems to apply to public interest lawyers. Judge Abella stated in her report on legal services for the disabled that "It seems at times as if there is a myth that lawyers who act for the disadvantaged should be paid significantly less for their professional services.[91])

Finally, the benefits felt from public interest advocacy are as yet limited in Canada. This results from a combination of factors, including lack of access to the courts, a closed decision-making process and little funding set aside for public interest advocacy. As the courts become more available through the Charter and changes in legislation allowing class actions and as advocacy is increasingly employed by a variety of interest groups, the merits in this approach to subsidized legal services will be easier to assess.

Nevertheless, considerable discussion about the benefit of increased public interest advocacy and citizen involvement in policy and law-making has already been generated in Canada. The main advantages which have been identified include:

1. A more informed decision can be made

2. It is a cost-effective method of bridging the gap between the stated goal of equal access to justice and the actual level of service provided by provincial governments
   because all interests have comparable services available to them

3. Protection of individual rights and freedoms is better ensured

4. Group legal services through public interest advocacy can reduce the caseload of legal aid clinics

In the remainder of this section, these arguments are discussed and existing advocacy services are examined to determine the extent to which benefits have actually been obtained.

1. A Better-Informed Decision

Involvement by non-economic interests in a decision-making process does not always mean representation by a specially trained advocate. Where the process is an informal one and where the decision or policy to be made involves questions which relate purely to values and are not of a technical nature, a lawyer does not have to be involved for the process to be a fair one.

Many administrative decisions, however, are not made in this way. They are often complex, both procedurally and in the issues which are considered, and the private interests involved are generally represented by both counsel and expert witnesses. In those situations, other interests cannot be expected to compete for the attention of a decision-maker without comparable resources.

A number of writers have emphasized the benefits to be gained by including a full range of interest representation in the administrative or regulatory process . For example, in a Working Paper on independent administrative agencies, the Law Reform Commission of Canada concluded that:

> The facilitation of a wider range of interest representation might lengthen the time it takes the agency to make a decision, and increase the cost of the agency's activities. On the other hand, there are benefits from increased interest representations to agencies with a large policy making role. These include: first, an improvement in the quality of decision-making through allowing an agency to expand its information base and gain a sense of community values; second, the bringing into the open and thereby adding to the legitimation of the policy-making process by satisfying the desires of constituent interests to involve themselves in important public issues; third, the reduction of any general tendency towards unthinking administrative conservatism; and fourth, in the case of regulatory agencies, the reduction of the possibility of agency members being "captured" by regulatees.[92]

It is clear from this excerpt that the authors do not consider that the process is improved because "citizens" have had a chance to have their say; rather, it is evident that the benefits are obtained because all interests, or at least more interests, have contributed to the process by making a wider range information available and by enabling a more open and unbiased procedure to occur.

In a study prepared for the Economic Council of Canada, Dr. Andrew Thompson arrives at similar conclusions. In reviewing environmental decision-making, where there has been the greatest pressure for citizen involvement, Dr. Thompson noted the following reasons for including public interest representation:

- third parties -- that is, those who would be affected by the decision -- can be identified
- evidence on community values can be brought forward, providing decision-makers with a framework for assessing gaps in the vb information provided
- agency capture can be prevented
- the process can be kept more open and accountable[93]

Similar comments have also been made by regulatory agencies and inquiry commissioners. The CRTC has emphasized the need for a wide range of expert opinion on the matters before them:

> The complexity and the importance of the issues which come before the Commission often demand that expert resources be available for their adequate treatment. Such resources are employed by the regulated companies. In the Commission's view, it is critical to, and part of the necessary cost of the regulatory process that such resources be available to responsible, representative interveners.[94]

Commissioner Berger considered it essential that possible impacts from construction of a pipeline down the Mackenzie Valley be identified by those who would be the recipients of those impacts rather than relying on the proponent to provide this information. In an analysis of the inquiry process, he made the following comments:

> We have therefore provided funds to a consortium of environmental groups, to enable them to carry out their own research, so that they can participate in the Inquiry as advocates on behalf of the environment. In this way the environmental interest is made a part of the whole hearing process.[95]

The B.C. Utilities Commission, in a decision following year-long hearings on a hydroelectric project in north-eastern B.C. concluded that the public interest interveners were an important part of the process:

> The Site C Panel awarded costs and had them paid by the applicant; it believes this contributed to a fair and comprehensive review process.[96]

Although the length of time required to make a decision may be extended somewhat by the involvement of all interests in the process, the result may be to everyone's advantage. As a result of the Site C Hearings, for example, construction of the dam was halted indefinitely. Without a public hearing, B.C. Hydor would have been allowed to proceed with the dam, a decision which would have cost the B.C. taxpayers hundreds of millions of dollars for every year the project wasn't needed.

Many other examples of the economies gained by involving all interests also exist. The Public Interest Advocacy Centre in Toronto and Vancouver has been successful in keeping down telephone rates, while improving service quality, through consistent and thorough representation of clients such as the National Anti-Poverty Organization, L'Association des Consommateurs du Quebec and the Federated Anti-Poverty Organizations.[97]

Manitoba's Public Interest Department was successful in halting the construction of a major overpass in Winnipeg, by acting for inner-city clients. As a result, different solutions were found to ease the traffic problem and the city was saved the construction expense of $30-40 million.[98]

The clearest economic justification for subsidization of public interest advocacy can be found in examining the regulatory process. Better information is obtained, decisions take into account more interests and often, money is saved. Despite these clear advantages, few decision-making tribunals in this country make costs or funding available to public interest participants. At the Federal level, only the CRTC awards costs. Even in that situation, interveners must rely on the services of public interest law firms to obtain legal assistance, because of the lengthy and cumbersome process of obtaining costs.

At least four federal studies since 1979 have looked at this problem and recommended that proper funding mechanisms be put in place for interveners.[99] To date, none of these recommendations has been implemented.

There are many areas of policy-making which are not carried out in a public forum, but affect various interests in society in as profound a manner as the decisions made by regulatory tribunals. If regulatory hearings are seen as a microcosm for policy-making in other areas, it is evident that the same advantages regarding information and impartiality would be gained by involving perspectives represented by public interest advocates in all areas of public policy.

B. A Cost-effective Method of Improving Access to Justice

The principle that the disadvantaged have the right to legal services has been accepted by most provinces in Canada. The range of services made available, however, falls far short of the level of assistance that this concept implies. Because of limited funding. most legal service programs have found it difficult to meet the immediate needs of those "passing" a means test. and even that has become an increasingly difficult struggle. Law reform and legal education are rarely. if ever a priority.

Without legal services to redress more general problems and effect change in social structures. it is evident that the disadvantaged and public interest organizations lack an important tool held by private interests in society. In his analysis on "Legal Services and the Poor", Dick Gathercole concludes that:

> Even with adequate funding however, there are inherent weaknesses in exising legal aid programs which result in seriously inadequate access of the poor to legal services. The main weakness is the emphasis on individual case service. This results in a curative rather than a preventative approach to legal problems. It also means that available legal aid resources cannot begin to cope with the potential caseload let alone undertake effective law reform. lobbying or other group-oriented activities.[100]

The ability of corporate interests to protect their position through influence of policy-makers or "accomodation politics" as it has been referred to. has been well-documented. The study on "Access and the Policy-making Process". for example. which was done for the Canadian Council on Social Development lists more than 20 articles which describe the success of the private sector in persuading decision-makers to see things their way.[101]

One important advantage which the corporate sector has over those representing the public interest is access to legal services.[102] That is. lawyers not just to take care of day-to-day legal problems, but also to identify areas of relevant legislation and policy-making and to identify those making such decisions so that appropriate preventative or remedial action can be taken. Lawyers employed by legal aid generally don't have the time, expertise or the mandate to provide these services to the disadvantaged and/or public interest organizations.

The advantages to society as a whole of having all interests participate in the policy-making process have been pointed out by a number of writers. For example, in a collection of articles entitled "Lawyers and the Consumer Interest", Evans and Wolfson argue that:

> ... in an open society, there is a general social interest in having available to individuals information which will allow them to assess their own legal needs as well as the opportunities for addressing those needs.
>
> ... For society as a whole to function in a stable and orderly way and its members to accept its rules and constraints, justice must at least be seen to be done.[103]

In other words, all members of society should have the opportunity to understand laws and policies which may affect them and to be able to obtain assistance in reaching decision-makers where changes are necessary. This concern was consistently raised during the People's Law Conference held in May, 1983. For example, Mary Guichon, a senate member of the University of Calgary and conference participant, stated that:

> A fundamental principle of democracy, known to every school child, is that people are governed with their own consent; laws are made by the people and for the people. What is often overlooked is the obligation this creates to establish effective two-way communication between governments and the people.[104]

Brickey and Bracken make the same general observations about the need for an "informed citizenry" for a democratic society to function at its best. Where citizens are unaware of how the system works and how to affect decisions, they are unable to participate effectively in a democracy.[105]

In practical terms, those who are not experienced in dealing with government will have little opportunity to affect policy of statutes unless they are able to obtain the specialized services of someone who is both familiar with the relevant legislation and the agencies responsible for its administration. This can be seen in examining the impact of two recent programs, the Farmworkers Legal Services Project (FLSP) and Manitoba's Public Interest Department (PID).

In B.C., farmworkers have been exempt from workers compensation coverage largely because those in this category are primarily from racial minorities with little power within the B.C. political system. The FLSP has carried on an extensive lobby since 1981 to bring farmworkers within this legislation and has achieved a partial success. In the words of the FLSP evaluation: "farmworkers are now covered by the insurance aspect of WCB but not by the preventative health and safety component which could reduce the risk of injury in a statistically highly dangerous occupation. In place of enforced regulations, a voluntary farm safety agency is to be established for a 12 month trial period to "get farmers to cooperate" on safety standards."[106]

The PID has also been able to achieve results which are not possible under regular legal programs. For example it was able to lobby for a public inquiry on behalf of citizens living in an inner city area which was to be expropriated. Once successful in obtaining the inquiry, the PID presented a comprehensive alternative community plan to the hearings, based on a series of community meetings. Ultimately, the proposed plan was adopted by the inquiry and the expropriation was abandoned.

3. Protection of Individual Rights and Freedoms

Government and corporate policy affect us on a daily basis; yet, their impact on any one person is generally not great enough for that individual to make a large investment in either time or money to make his or her concerns known. For example, decisions to increase telephone rates by 6% or require social insurance numbers for everyone working in Canada may have immediate impacts on a large number of people. However few would be willing to conduct the necessary research or hire expert assistance to protect their interests.

Another factor which mitigates against involvement in matters which affect an individual's life is a predisposition against challenging government or corporate decisions. As Brickey and Bracken point out:

> A second tradition is reflected in the reluctance on the part of citizens to confront the state, because of the belief that it is the government that makes the laws and the public that accepts them. As Mohr (in Sussman & Morse. 1981) points out "the conception of government as dispenser of laws is, if anything, stronger than ever".
>
> ...an orientation to take on the government, the corporation, etc. for violating rights is not firmly rooted in our society.[107]

Finally, the ever-increasing complexity of administrative machinery makes it virtually impossible for citizens who are unassisted to challenge decisions which affect their lives. unassisted. As Brickey and Bracken comment:

> there has been "a massive expansion in the body of laws affecting everyday life and an increasing complexity in the laws themselves." (Society of Labour Lawyers 1968:3) and thus one's ability to function adequately within society rests on

> the ability to understand the effect of law on everyday life.[108]

The complexity of existing legislation was another theme which surfaced at the People's Law Conference in Ottawa last year. For example, the introduction to the section on "Reforming the Law" states that:

> Most participants agree that there is one overriding problem affecting law reform, namely, the sheer size and complexity of our legal system.[109]

The subsidization of legal services to public interest representatives has been suggested as a cost-effective way of assisting individuals to overcome these impediments to resolving unfair actions by government or corporations for several reasons.

Firstly, public interest groups make it possible for individual concerns to be expressed to governments and corporations in a coherent and well-informed manner. Legal assistance to such groups allow them to effectively represent the interests of their members in regulatory hearings, class actions and test cases or the development of law or policy reform.

Many of the organizations which have formed around issues which affect a broad spectrum of society -- that is, consumer, environmental and civil liberties issues -- are composed largely of people who individually would not qualify for legal assistance. However, as a group, they are unable to afford the expertise, including legal assistance, that is required to be involved in the regulatory process or to commence test litigation or class actions. This is because of the tremendous cost involved in participating effectively in an administrative hearing, the large investment in time and money that is often required just to keep an organization in operation and the very small individual benefits that are gained by the activities of the group.

Secondly, when such an organization is able to participate in the regulatory process through subsidized legal services, many more individuals in society than just the members of the group gain. For example when the CAC is represented at rate hearings and succeeds at reducing telephone rates or improving service, everyone who pays for telephone service, including the disadvantaged, benefits. Similarly, when the mercury contamination from a pulp mill is reduced by the involvment of an environmental group in pollution hearings, all who live in the area stand to gain.

Finally, public interest advocates correct the imbalance which occurs when governments receive input exclusively from the private sector in matters of public policy. Lawyers have traditionally provided advice to private interests to ensure that legislators are well-acquainted with their point of view before implementing legislation or directing policy changes. Until recently, it was difficult for other points of view to find expression in policy-making. One American writer has described the inroads made by public interest advocates in this way:

> ... public interest lawyers began to work an area that had only been tangentially touched by poverty or political lawyers -- that domain where corporate power shaped governmental power. Here the legal system was not merely a neutral observer. By underrepresenting citizen interests and overrepresenting corporate interests, the legal profession exacerbated the problems inherent in governmental attempts to assert public control over corporate authority.[110]

In summary, public interest advocacy provides the only effective means of redressing unfair government policy or corporate actions which are beyond the resources and ability of individuals to resolve.

4. Reduce Burden on Legal Aid Offices

Public interest advocates do not necessarily serve to reduce the workload of legal aid programmes. In many instances, the specialized clinics are actually providing services to those who needed legal services but were simply not being reached by regular legal aid clinics, for a variety of reasons. These reasons include:

- Lack of awareness that a legal problem existed: For example, the evaluation of the Farmworkers Legal Services Project of B.C. found that:

> ...prior to the advent of the FLSP, the Community Law Office [of the provincial Legal Services Society] was not dealing with labour problems and was particularly not dealing with farmworker problems... without the particular approach used by the FLSP and the flexibility of their tactics, farmworker cases would never come to the office in the first place.[111]

Lawyers may also be unaware that their client has a problem that can be remedied through law reform or through the courts. Awareness of legal solutions requires a familiarity with an area of the law that can only be obtained by frequently working in that particular area. Arne Peltz of the Public Interest Department in Winnipeg commented on this problem with legal aid offices which must cover a broad spectrum of legal issues. Because of his specialization in public interest law, for example, he was able to develop a Charter of Rights argument about the closing of a school, which had not occurred to any other lawyers.[114]

- Inaccessibility of legal aid offices: Judge Abella, in her study on "Access to Legal Services by the Disabled" described the difficulties that the handicapped have in obtaining legal services:

> For no one are the problems of access to legal services as severe as for the physically and mentally disabled. Added to the difficulties anyone else might have are the additional problems of mobility, communication, isolation and a parochial public attitude. And these obstacles are in addition to the financial hardship and lack of information which have traditionally impeded access to legal services. All of these impediments combine to make legal services practically unattainable for a significant number of disabled persons.[115]

Language and culture can also pose an obstacle to legal services. As the FLSP evaluation points out:

> ...cultural and class barriers within the farmworker community make an informal clinical setting at the offices of a farmworker-based organization much more conducive to discussing legal issues than an isolated, formal legal office, even if that office is a rather relaxed Community Law Office. The second is that language barriers continue to plague the project staff...[114]

- Existing Overload at Legal Aid Clinics: Many clinics are currently so under-staffed that they do not have the resources to undertake public interest advocacy. Judge Abella found that Ontario clinics would be unable to provide any further services for the disabled, even if they wanted to:

> At present, virtually all legal clinics are operating at the very limits of their capacity. Caseloads have so burgeoned that in many clinics there is simply no capacity to take on significant amounts of extra casework.[115]

The FLSP Evaluation observed that the kind of preparation required to conduct law reform couldn't occur at a legal aid office:

> Legal Services funding does not allow for the time and energy

to get into lengthy test cases, do intensive research, write briefs, etc. In fact, more than 50% of FLSP work would be impossible within the mandate of the typical CLO.[116]

- *Public interest advocates act for clients who normally might not fall within the mandate of a legal aid clinic.* With the exception of Manitoba, no provincial legal aid programme specifically targets public interest organizations. As well, many such organizations would find it difficult to show that all of their members would be eligible for legal assistance.

The public interest advocate can therefore expect that much of his/her caseload will not be a duplication of work done by legal aid and will in fact be providing "new voices for new constituencies" as one book on the subject put it. Judge Abella justifies this added range of services in the following way:

> Making services available to hitherto unrecognized constituents does not require us to expand our commmitments as a society, but merely to implement our current commitments. We are not creating new rights we are fulfilling existing ones.[117]

Nevertheless, those providing advocacy services reduce the caseload of legal aid in three specific ways:

a. By taking referrals from other legal aid lawyers who do not have the expertise to quickly and efficiently deliver the necessary legal services

b. By undertaking law reform that will alleviate legal problems of those using legal services

c. By providing advocacy training for those who otherwise would depend on legal aid lawyers

a. Expertise

Lawyers working in general legal aid offices rarely have the opportunity to acquire the specialized knowledge required to conduct public interest advocacy on behalf of the disadvantaged. As described earlier, legal aid offices in Manitoba which are presented with public interest type issues funnel such cases through the Public Interest Department. This process ensures that staff time at general offices is not wasted by attempting to learn the law in a new subject area; rather, the case is analysed by lawyers at the Public Interest Department who can quickly assess whether legal remedies are available and if so, act on them.

The advantages of specialization are also recognized in the report on "Access to Legal Services to the Disabled":

> If...the lawyer seeks effectively to represent the disabled client in dealing with that client's social service network, an additional layer of training is desirable. In most cases, this is a layer of knowledge which would be identical to the one required by the lawyer acting for a disadvantaged client who is not disabled. They may share in common a need to know the legislation, regulations and bureaucracies which define the government services and benefits area and which permeate the lives of disadvantaged people. And they share the need to understand how, where and why these strands intersect. It can be a dauntingly confusing play unless one knows the script and the players.

Public interest lawyers who specialize in a particular area are able to gain the information Judge Abella refers to and can therefore provide legal services in that area more efficiently and effectively than their legal aid counterparts. This can result in a net reduction in workload for legal aid offices, as long as there is a mechanism of referral such as that in Manitoba or under the clinic system in Ontario.

b. Law Reform

Law reform and test litigation conducted by public interest lawyers has resulted in changes in legislation or policy which address legal problems shared by a large number of people and which therefore reduce the total workload of legal service organizations. The following are examples of situations where this has occurred:

- The Vancouver Community Legal Assistance Society commenced a class action on behalf of electricity users who were required by B.C. Hydro to pay a deposit because of their uncertain financial status. Instead of attempting to handle these complaints on an individual basis, VCLAS used the class action to obtain a declaration that a deposit could not be required from anyone and resolved all of the complaints at one time.

- The Farmworkers Project in B.C. has been able to obtain changes in legislation which address concerns shared by a large number of farmworkers. The FLSP Evaluation describes one such success:

  > For the farmworkers, the new law [Employment Standards Act] was meaningless if the contractor decided to ignore the law. If the contractor refused to be licensed, or if

> he disappeared immediately after the growing season, enforcement of the Act became next to impossible. FLSP had to deal with numerous cases in this category.
>
> In one typical case handled by the FLSP an unlicensed contractor (operating in contravention of the Act) dropped out of sight when wages became due. The FLSP used this case to establish the principle embodied in the Act that the farmer was responsible for wages where the contractor had reneged.... Publicity of this case undoubtedly had impact on farmers contemplating doing business with unscrupulous, unlicensed contractors in future seasons.[118]

- The Manitoba Public Interest Department has also been involved in test case type litigation to obtain a group remedy rather than individual remedies. In one class action, which was eventually dismissed, the PID attempted to have a pre-trial detention centre closed. The centre had been subject to a number of inquests and a great deal of criticism as a result of its inadequate facilities. Following dismissal of the class action, 10 individual actions were commenced, based on sections 7 and 12 of the Charter of Rights.[119]

c. Advocacy Training

The existing lack of adequate legal services for those that require them and the recent recession which Canada has experienced have prompted all of the public interest advocates that I spoke with to consider advocacy training programs.[120] These programs are seen as a way of increasing the self-reliance of interest groups and as a means of ensuring that many more people can receive the benefits of legal skills with existing resources. The 1980 Annual Report of the Public Interest Advocacy Centre set out this justification for making advocacy training a priority:

> Since it was obvious that we couldn't represent more than a fraction of the groups seeking our services, there was clearly an important unmet need and and an advocacy training program was developed.[121]

Two such programs that were carried out in 1983 illustrate the effectiveness of advocacy training:

a) Family Law Training Project

This project was commenced during the summer of 1983 by the B.C. Public Interest Advocacy Centre. Students were hired to produce materials on family court procedures, describing the law and way it is applied in a straightforward and easily utilized way. These materials have since been used by PIAC to provide training to those who provide services in family-related areas in order that "informed support" can be given to those using the family court system. As many people, and particularly women appear in family court unrepresented, contact with these trained personnel is often the only source of information about the way in which the family court system operateds.

In one session held by PIAC in January of this year, 28 people from a variety of community organizations attended. In another, which was held in a small B.C. community, the training session received support from both the local Bar and family court judge.

b) Environmental Hearing Workshop

In the spring of 1983, the B.C. PIAC and the West Coast Environmental Law Association held a two-day workshop in the Queen Charlotte Islands for Indian leaders from B.C. Coastal bands. During the workshop, practice and procedure before tribunals dealing with environmental issues, such as the National Energy Board, were discussed and mock interventions were prepared. As the majority of environmental hearings do not involve the award of costs or funding for interveners, the workshop was designed to allow the bands to participate in such hearings without the benefit of legal counsel.

Because legal services have been slashed in B.C., it is unlikely that the people receiving the benefit of this training would be eligible for legal aid. However, in a situation where provincial assistance has significant gaps, advocacy training ensures that the benefits of some legal information reaches a far greater number of people who need these services than would have been possible by a direct solicitor-client relationship.

In other provinces which provide a higher level of service, such as Ontario, programs such as those carried out by the PIAC and proposed by ARCH in that province serve to reduce the workload of existing clinics and legal aid offices.

B. Reaction to Public Interest Advocacy

At this point in the development of public interest advocacy in Canada, very little hostile reaction to these activities has been generated. Those that I interviewed about this question consistently stated that there was little public reaction to their advocacy work, but that policy-makers (and, of course, their clients) were generally supportive[122]. As well, where private interests were directly involved, the fact that subsidized legal services were being made available was usually not raised as an issue.

Public interest law firms in Canada have had the highest profile around law reform and impact litigation activities, because of their almost exclusive orientation towards these services. Nevertheless, they have not been the target of criticism from the Bar or from legislators. The Public Interest Advocacy Centre has received positive feedback for its representation of poverty and consumer groups before the CRTC. Letters of support have been received from regulators, as well as regulatees, when funding applications are prepared. In addition, they have been contacted by counsel for regulated companies to encourage their participation in administrative hearings, because of the increased credibility which the entire process was accorded through their involvement. Andrew Roman made it clear that any clients with the funds to pay for a lawyer were referred to lawyers in private practice, thus ensuring that members of the Bar were not alientated.

The Environmental Law Centres have had similar experiences. To a large extent, the principle of public involvement in environmental decision-making has acceptance, even if it isn't always practiced. For this reason, when a citizen's group is represented at a toxic waste or pesticide hearing, that involvement is considered to be one of the costs of doing business. Staff counsel at West Coast Environmental Law Association could only identify one example where lawyers acting for a company objected to their involvement in an issue. In that case, solicitors for a mining company attempted to persuade the B.C. Law Foundation that WCELA should not be funded because it advocated public involvement in licencing the mine.

A number of factors contribute to the lack of backlash which public interest law firms in Canada have experienced. Firstly, they operate primarily in the consumer and environmental areas where the concept of citizen involvement is generally supported. As a result, there is more debate about the degree to which the public should be involved in the regulatory process than there is about the subsidization of legal services.
involve4ment

As well, these firms have been careful to ensure that the clients they accept cannot afford lawyer's fees and that the issues involve important questions of public interest and not merely of collective private interests. Finally, because of the limited access to the courts, largely as a result of strict rules regarding class actions, they are also more likely to be involved in regulatory proceedings or law reform. Private interests are less likely to react in those situations than where extensive litigation is involved, because they are more likely to consider the regulatory process a necessary evil, or, where law reform is concerned, are not likely to be as directly affected.

Reaction to services provided by provincial legal aid programs is a little more difficult to assess because the public interest advocacy component is generally a small percentage of the total service provided. Where someone is critical of subsidized legal services being provided, it generally relates to private interests rather than matters of public interest. As one American legal aid lawyer argued:

> Although it is absolutely true that most of our vehement opponents complain about lobbying or impact cases, it should also be obvious that all or almost all of the witnesses who have complained about us had another dominant complaint.... It is and always has been service case work which generates the hostility, because it is in service cases that we oppose individual opponents who are most likely to be angered on an emotional level by our activities -- because those activities interfere directly with their interests in making profit or asserting some form of power.[123]

Arne Peltz of Manitoba's Public Interest Department indicated that few complaints had been received about the PID's advocacy activities. He felt that this was because the target of their activities was generally some level of government. As well, the Department was careful to maintain a mix of cases, so that actions on behalf of a small segment of the population such as prisoners' rights issues were balanced with those providing widespread benefits and support, such as rate cases.

At the other end of the response spectrum is the Farmworkers Legal Services Project. Calvin Sandborne encountered complaints -- mainly, from farmers -- about the FLSP's entire range of activities, including litigation, law reform and publication of a booklet on legal rights. It was his opinion that the kind of complaints which arose were the result of economic positions being directly threatened and were typical of the criticism legal aid lawyers often receive about individual clients. Many farmers contacted the regional head of the legal services society to suggest that the assistance being provided by FLSP was inappropriate for tax paid legal aid (fortunately, or unfortunately, LSS contributed little to FLSP) and one MLA suggested that the entire range of legal services in the Abbotsford area (where the FLSP had its offices) be discontinued.[124]

It appears inevitable that where advocates represent groups or individuals which have little power in society and where private interests are directly threatened, those interests will react in some fashion to the subsidization of legal services to oppose them.

A recent example of such a controversy occurred in Oregon where the state bar association held an investigation into the activities of the law reform-oriented Legal Aid Program, based on complaints from two landlords who had been the target of legal aid litigation. One of the main questions which the investigation considered was the "testimony before the Committee that public acceptability of legal aid is harmed by legal aid's participation in legislative and lobbying activities."[125]

The Director of litigation of one of the legal aid offices appeared before the Committee to present a summary of the law reform and test litigation that his office had undertaken and to argue the effectiveness of that approach. The following are excerpts from that testimony:

> Our legislative efforts simply cannot be attacked on a cost/benefit level: they are clearly worth their cost both in terms of accomplishing our clients' objectives in the cases we do accept, and in terms of solving or avoiding problems which would otherwise compete for our attention. You can oppose our lobbying on the theory you don't like our clients' objectives in the legislature, or on the theory you are opposed to tax supported lobbying efforts ... but you cannot make a case for a net loss to our clients.
>
> ... it is clear that our impact cases accomplish more than enough for the clients they benefit to justify our refusal to adopt the ridiculously inefficient approach of limiting all litigation to cases which only affect a single client or family.... Many of them, however, have additional long-range benefits in terms of social costs and benefits. For example, encouraging relatives to accept foster children may eliminate many future cases of delinquency; helping present welfare recipients pursue educational activities may permit them to get off welfare altogether; increasing the availability of emergency assistance may even have some impact on crime rates.[126]

In its final Report, the Committee made no comment about test litigation but reached the following finding about law reform:

> We find that the benefits of lobbying activity outweigh any harm to the public acceptability of legal aid because of its lobbying. To a great extent the antagonism to lobbying is based on the mistaken view that lobbying by Legal Aid attorneys is illegal or upon the view that it is a waste of resources that would be better used for client service.[127]

To date, public interest advocacy in Canada has not developed to nearly the same extent as it has in the United States. As well, the courts have not been as accessible because of the limits on class actions and the constitutional arguments available (prior to the Charter). The targets of litigation which has occurred has often involved government or regulated industries. As a result, no organized lobby has developed against the subsidization of public interest advocacy in this country.

Increased litigation from liberalizing of class action rules and expanded use of the Charter to protect the rights of the disadvantaged in society may well cause a backlash. However, that backlash will not result from decreased public support for public interest advocacy or because of increased use of the courts to protect the public interest; rather, it will depend on the interests which are directly affected by these activities.

FOOTNOTES

1. Henry Chapin and Denis Deneau, Access and the Policy-Making Process, Canadian Council on Social Development, 1978 at 6

2. Robert Presthus describes this role of government at pages 23 - 24 of Elite Accomodation in Canadian Politics, Toronto, Macmillan, 1973

3. See for example, J. E. Hodgetts, "Government Responsiveness to the Public Interest", (1981) Canadian Public Administration, Vol. 24, 216 at 219 and
Simon Lazarus and Joseph Onek, "The Regulators and the People", (1971) 57 Virginia L. Rev., 1069 at 1077

4. David Fox, Public Participation in the Administrative Process, Law Reform Commission of Canada, 1979 at 3

5. Simon Lazarus and Joseph Onek, op. cit., at 1074

6. Robert Presthus, supra, note 2, at 99

7. Thomas Berger, "Mackenzie Valley Pipeline Inquiry", Queen's Quarterly, Vol. 83, No. 1 at 1-2

8. Russ Anthony's submission to the West Coast Oil Ports Inquiry, 1977, at 131

9. Jonah Goldstein, "Public Interest Groups and Public Policy: The Case of the Consumers' Association of Canada", Can. J. of Pol. Sci. (1979) 12: 137 at 138

10. Simon Lazarus and Joseph Onek, op. cit., at 1077

11. Robert L. Rabin, "Lawyers for Social Change: Perspectives on Public Interest Law" (1976) 28 Stanford L. Rev. 207 at 230, note 74

12. H. Craig Becker, "In Defence of an Embattled Mode of Advocacy: An Analysis and Justification of Public Interest Practice", (1981), 90 Yale L. J. at 1436

13. Council for Public Interest Law, Balancing the Scales of Justice/Financing Public Interest Law in America, 1976, at 19-21

14. Capelletti, Gordley & Johnson, Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies, Dobbs Ferry: Oceana 1975

15. Robert L. Rabin, op. cit., at 208 et seq.

16. Robert L. Rabin, *op. cit.*, at 211 et seq.

17. Council for Public Interest Law, *op. cit.*, at 33

18. *Ibid*, at 34

19. Robert L. Rabin, *op. cit.*, at 216 et seq.

20. Paul H. Francis, "Legal Aid: The Demise of Idealism", (1973) 23 *Wayne L. Rev.*, 1261 at 1264

21. Weisbrod, Burton A., et al, ed., *Public Interest Law: An Economic and Institutional Analysis*, U. Cal. Press, Berkeley, 1978 at 47

22. *Ibid*, at 46

23. *Ibid*, at 47

24. Robert L. Rabin, *supra*, note 11, at 219 et sea.

25. Weisbrod, *op. cit.*, at 229

26. Robert L. Rabin, *op. cit.* at 224

27. R. Buckhorn, *Nader: The Peoples Lawyer*, Prentice-Hall, 1972, at 154-55

28. Ford Foundation, *The Public Interest Law Firm: New Voices for New Constituencies*, 1973.

29. Weisbrod, *op. cit.*, at 48

30. *Ibid*, at 67

31. The Acknowledgements at p. iii of this report list the individuals which I interviewed during the course of my research.

32. Jonah Goldstein, "Public Interest Groups and Public Policy: The Case of the Consumers Association of Canada", *Can. J. Pol. Sci.*, (1979) Vol. 12 at 137.

33. Robert Presthus, *supra*, note 8

34. Jonah Goldstein, *op. cit.*, at 138

35. Christine Wihak, *The Needs of Community Groups for Public Legal Education*, Department of Justice, 1983

36. David Fox, Public Participation In The Administrative Process, Law Reform Commission, Administrative Law Series, 1979 at 62

37. Ibid, at 69

38. Personal communication with Andrew Roman, Executive Director, Public Interest Advocacy Centre

39. 1982 Annual Report, Commission des Services Juridiques de Quebec, at 38

40. 1983 Annual Report, Commission des Services Juridiques de Quebec

41. Norman Larsen, "Seven Years With Legal Aid", Man. L. J., (1983) Vol. II at 237

42. The Honourable S. G. M. Grange, Report of the Commission on Clinical Funding, 1978 at 4

43. Ibid, at 11

44. Ibid, at 21

45. Ibid. at 25

46. Notice of Public Hearings of the Task Force on Public Legal Services, B.C., 1984

47. Richard Gathercole, "Legal Services and the Poor", in Law and the Consumer Interest, Evans and Trebilcock, ed.

48. Ibid, at 413

49. Ibid, at 414

50. Pat Delbridge and Associates, Connectives, Toronto, 1982. Unless indicated to the contrary, the information regarding the membership and funding of public interest organizations in Canada was obtained from this publication.

51. Christine Wihak, supra, note 35. This information was obtained from the raw data gathered during this study.

52. Melanie Dobbin, Consumer Interest Group Inventory, for Consumer and Corporate Affairs Canada, August, 1978

53. Henry Chapin and Denis Deneau, Access and the Policy-making Process, Canadian Council on Social Development, 1978 at 5 et seq.

54. *Ibid*, at 5

55. A. P. Pross ed., *Pressure Group Behaviour in Canadian Politics*, McGraw Hill Ryerson, Toronto, 1975 at 18

56. *Ibid*, at 24

57. *Ibid*, at 21

58. David Fox, *supra*, note 36

59. A. P. Pross, ed., *supra*, note 55, at 189

60. Weisbrod et al, ed., *supra*, note 21, at 142

61. Jonah Goldstein, *supra*, note 32, at 37

62. Pat Delbridge and Associates, *supra*, note 50

63. CRTC Procedures and Practices in Telecommunications Regulation, Telecom Decision CRTC 78-4, May 23, 1978, under the heading "Assistance to the Public"

64. Pat Delbridge, *supra*, note 50

65. Barry Sadler, ed., *Involvement and the Environment*, 1977, Proceedings of the Canadian Conference on Public Participation at ix

66. Survey conducted by Environment Canada in 1982 showed public support for environmental values is still high

67. Personal communication with environmental organizations as well as Pat Delbridge et al, *supra*, note 50

68. Barry Sadler, ed., *supra*, note 65, presentation by David Estrin at 84

69. Christine Wihak, *supra*, note 35.

70. Don Whiteside, "Historical analysis of Civil Liberties Organizations in Canada", Ottawa, 1972

71. M. Swinwood and G. Theriault, *Civil Liberties and Human Rights Associations*, for Secretary of State, 1972

72. Article in the Canadian Bar Association's "National", December, 1983 at 69

73. Charles Reich et al, "The New Public Interest Lawyers", *Yale L. J.*, 1970 at 1069

74. Henry Chapin and Denis Deneau, supra, note 53, at 5

75. Personal communication with Allen McLean and David Mossup, staff lawyers at the Vancouver Community Legal Assistance Society

76. Judge Rosalie S. Abella, Access to Legal Services by the Disabled, Ontario, 1983, at 14

77. Christine Wihak, supra, note 35. Information obtained from raw data produced by the study.

78. Judge Rosalie S. Abella, op. cit., at 34-35 and 43

79. Ibid, at 134-136

80. supra, note 31

81. Kenneth Swan, "Government and Courts: Where's the Line Drawn?", National, December 1983 at 16

82. Penny Kone, The Taking of Twenty-Eight, 1983, at preface.

83. Judge Rosalie S. Abella, supra, note 76, at 43

84. Report from the People's Law Conference, The People's Law, Ottawa, 1984, at 149

85. Ibid, at 150

86. 90 Yale L. J., 1436 at 1449 (no author cited)

87. Richard Gathercole, supra, note 47, at 426

88. Ibid, at 416

89. 1980 Annual Report of the Public Interest Advocacy Centre, at 6-8

90. Toronto Star, November 8, 1983 at B1

91. Judge Abella, supra, note 76, at 69

92. Law Reform Commission of Canada, Independent Administrative Agencies, Working Paper 25, Ottawa, 1980, at 100

93. Andrew Thompson, Environmental Regulation in Canada, Economic Council of Canada, 1980, at 43

94. CRTC, supra, note 63.

95. Thomas Berger, *supra*, note 9

96. B.C. Utilities Commission, *Site C Report: The Review Process and Recommendations for Future Reviews*, 1983, at 9

97. Andrew Roman, Brief of the Public Interest Advocacy Centre to the Royal Commission on the Economic Union and Developmental Prospects for Canada, at 5

98. Personal Communication with Arne Peltz, Director, Public Interest Department, Manitoba Legal Aid

99. Andrew Roman, *supra*, at 9; specifically, the House of Commons Special Committee on Regulatory Reform (December, 1982), David Fox's *Public Participation in the Administrative Process*, *supra*, note 4, the Economic Council of Canada's *Reforming Regulation* (1981) and the Science Council of Canada's *Regulating the Regulators* (October, 1982)

100. Richard Gathercole, *supra*, note 47, at 416

101. Henry Chapin and Denis Deneau, *supra*, note 1, at 4

102. See, for example, Ralph Nader and Mark Green ed., *Verdicts on Lawyers*, New York , 1976

103. Trebilcock, M. J., and Roberts G. Evans, ed., *Lawyers and the Consumer Interest*: *Regulating the Market for Legal Services*, Butterworths, Toronto, 1982

104. *The People's Law*, *supra*, note 84, at 44

105. Stephen Brickey and Denis Bracken, *Public Legal Needs in Canada: Towards a Conceptual Framework*, 1982, at 47

106. Leo McGrady, Research Coordinator, *Farmworkers Legal Services of B.C. Project Evaluation for the Department of Justice*, 1983, at 22

107. Brickey and Bracken, *op. cit.*, at 52 - 53

108. *Ibid*, at 27

109. *The People's Law*, *supra*, note 84, at 138

110. Charles R. Halpern, "The Public Interest Bar: An Audit" 158 at 160 in *Verdicts on Lawyers*, Ralph Nader and Mark Green, ed., 1976

111. Leo McGrady, *supra*, note 106, at 103

112. Personal Communication with Arne Peltz, Director, Public Interest Department, Manitoba Legal Aid

113. Judge Abella, supra, note 76, at 11

114. Leo McGrady, supra, note 106, at 107

115. Judge Abella, supra, note 76, at 35

116. Leo McGrady, supra, note 106, at 104

117. Judge Abella, supra, note 76, at 6

118. Leo McGrady, supra, note 106, at 91

119. Personal Communication with Arne Peltz, supra, note 112

120. This includes staff counsel at: environmental law and public interest advocacy centres, Manitoba's Public Interest Department and ARCH

121. Public Interest Advocacy Centre, 1980 Annual Report, at 13

122. The public interest lawyers which I interviewed are listed in the Acknowledgements at p. iii

123. Michael Marcus, in a brief on behalf of the Legal Services Corporation

124. Leo McGrady, supra, note 106

125. Report of the Special Committee on Legal Aid Investigation, to the Board of Governors, Oregon State Bar, May 31, 1978, at 58

126. Testimony of Michael H. Marcus, Director of Litigation, Legal Aid Service, 1977, at 19, 20 and 22

127. Report of the Special Committee, supra, note 125, at 44

BIBLIOGRAPHY

Abella, Judge Rosalie S., Access to Legal Services by the Disabled, Ontario, 1983

Anand, Raj and Ian G. Scott, Q.C., "Financing Public Participation in Environmental Decision Making", (1982) 60 Canadian Bar Review at 81

Becker, H. Craig, "In Defence of an Embattled Mode of Advocacy: An Analysis and Justification of Public Interest Practice", (1981) 90 Yale L. J. at 1436

Berger, Thomas, "Mackenzie Valley Pipeline Inquiry", Queen's Quarterly, Vol. 83, #1 at 1

Berry, Jefferey M., Lobbying for the People: the Political Behaviour of Public Interest Groups, Princeton, 1977

Blankenburg, Erchard, ed., Innovations in the Legal Services, Cambridge, Mass., 1980; in particular, the following articles: Charles Halpern, "The Public Interest Law Movement in the United States" at 101, and David M. Trubeck et al, "Legal Services and the Administrative State: From Public Interest Law to Public Advocacy" at 131

Brickey, Stephen and Denis Bracken, Public Legal Needs in Canada: Towards a Conceptual Framework, 1982

Buckhorn, R., Nader: The Peoples Lawyer, Prentice-Hall, 1972

Capalletti, Gordley & Johnson, Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies, Dobbs Ferry: Oceana, 1975

Centre for Public Representation, University of Wisconsin Law School, A Handbook on Public Advocacy in the Administrative State, 1976

Chapin, Henry and Denis Deneau, Access and the Policy-Making Process, Canadian Council on Social Development, 1978

Council for Public Interest Law, Balancing the Scales of Justice/Financing Public Interest Law in America, 1976

Ford Foundation, The Public Interest Law Firm: New Voices for New Constituencies, 1973

Fox, David, *Public Participation in the Administrative Process*, Law Reform Commission of Canada, 1979

Francis, Paul H., "Legal Aid: The Demise of Idealism", (1973) 23 *Wayne L. Rev.*, 1261

Gathercole, Richard, "Legal Services and the Poor", in *Lawyers and the Consumer Interest: Regulating the Market for Legal Services*, M. J. Trebilcock and R. G. Evans, Butterworths, Toronto, 1982

Gillespie, Colin, "Scope of Class Actions in Canada", (1981) 11 *Man. L. J.* at 215

Goldstein, Jonah, "Public Interest Groups and Public Policy: The Case of the Consumers' Association of Canada", (1979) *Can. J. of Pol. Sci.*, Vol. 12 at 137

Halpern, Charles R. et al, "Reflections on the New Public Interest Law", (1971) 59 *Geo. L. J.* at 1095

Handler, Joel F., "Public Interest Law Firms in the United States", in M. Cappalletti and B. Garth, eds., *Access to Justice, Vol. III: Emerging Issues and Perspectives*, Milan, 1979, at 421

Hodgetts, J. E., "Government Responsiveness to the Public Interest: Has Progress Been Made?", *(1981) Vol. 24 Canadian Public Administration* at 216

Larsen, Norman, "Seven Years with Legal Aid", *(1983) Man. L. J.*, Vol. II at 237

Law Reform Commission of Canada, *Independent Administrative Agencies*, Working Paper 25, Ottawa, 1980

Lazarus, Simon and Joseph Onek, "The Regulators and the People", (1971) 57 *Virginia L. Rev.*, 1069

Lowe, Carl, ed., *New Alignments in American Politics*, H. W. Wilson Company, N.Y. 1980

Marks, F. Raymond, *The Lawyer, The Public And Professional Responsibility*, Chicago American Bar Foundation, 1972

McGrady, Leo, Research Coordinator, *Farmworkers Legal Services Project Evaluation for the Department of Justice*, 1983

Nader, Ralph and Mark Green, ed., *Verdicts on Lawyers*, N. Y. 1976 (includes an article entitled "The Public Interest Bar: An Audit" by Charles Halpen at 158)

Presthus, Robert V., *Elite Accomodation in Canadian Politics*, Toronto, MacMillan, 1973

Pross, A. P. ed., *Pressure Group Behaviour in Canadian Politics*, McGraw Hill Ryerson, Toronto, 1975

Rabin, Robert L., "Lawyers for Social Change: Perspectives on Public Interest Law", (1976) 28 *Stanford L. Rev.* 207

Reich, Charles, "The New Public Interest Lawyers", *1970 Yale L. J.*, at 1069

Report from the People's Law Conference, *The People's Law*, Ottawa, 1984

Sadler, Barry, ed., *Involvement and the Environment*, 1977, Proceedings of the Canadian Conference on Public Participation

Swaigen, John, ed., *Environmental Rights in Canada*, Butterworths, Toronto, 1981

Thompson, Andrew, *Environmental Regulation in Canada*, Economic Council of Canada, 1980

Thompson, Fred and W. T. Stanbury, *The Political Economy of Interest Groups in the Legislative Process*, Institute for Research on Public Policy, Occasional Paper 9

Weisbrod, Burton A., et al, *Public Interest Law: An Economic and Institutional Analysis*, U. of Cal. Press, 1978

West, James V., *Public Interest Groups and the Judicial Process in Canada: The Need for a More Realistic Jurisprudence*, Department of Political Science, Carleton University, Occasional Paper # 51979

Wihak, Christine, *The Needs of Community Groups for Public Legal Education*, Department of Justice, 1983

APPENDIX I

LEGAL TOOLS USED BY PUBLIC INTEREST ADVOCATES

Advocacy activities generally fall into one of three categories:

1. Law Reform: This includes the preparation and presentation of proposals for legislative change as well as participation in policy-making hearings such as judicial inquiries and coroners' inquests.

2. Interventions Before Regulatory Tribunals: The intervention of public interest interveners before such tribunals as the CRTC, the National Energy Board, provincial utilities commmissions, environmental boards etc. has become commonplace over the last decade. For the most part, administrative boards in Canada have been willing to grant standing to anyone wishing to participate in their proceedings.

3. Use of the Courts: For a variety of reasons, this advocacy tactic has been the least used by public interest advocates in Canada. While U.S. groups have long used test cases, standing as amicus curiae and class actions to advance their interests, these activities have only recently been employed in Canada.

Law reform and interventions in regulatory hearings will not be defined further than that offered above, as they are generally well-understood. However, the ways in which the courts are used by public interest advocates will be explained in detail in this Appendix because the rules of procedure which govern them are complex and because this is the area where the greatest differences lie between advocacy in the U.S. and that practiced in Canada.

The following are methods most commonly used by interest groups in Canada and the U.S. to gain access to the courts:

A. Class actions

B. Test cases

C. Judicial review

D. Standing as amicus curiae

E. Private prosecutions

In the subsequent sections, each will be defined and examples provided. Where differences exist between American and Canadian laws governing these actions, they will be explained.

A. Class actions

Of the activities undertaken by public interest advocates in Canada, class actions appear to have one of the highest profiles. This is the likely result of two factors:

- media interest in this "mass" remedy, stimulated by the apparent success of class actions in the United States. For example, the Vancouver Sun carried an editorial entitled "Not So Classy" (December 20, 1982) calling for governments in Canada to follow the U.S. example and allow mass wrongs such as misleading advertising and pollution to be corrected through class actions
- efforts by a variety of interests including law reform commissions to alter the rules regulating these actions. For example, the Ontario Law Reform Commission recently recommended that the mechanism for commencing these actions in Ontario Supreme Court be modified to more closely resemble that used in the United States

The main difference in class actions between the U.S. and Canada is not in how they are defined but in the rules which govern them.

Class actions were developed more than 250 years ago to join a number of interests where it was too cumbersome to have those interests heard separately. A class action -- or representative action, as it is also known -- is simply defined as an action where one or more individuals sue (or are sued) in a personal capacity as well as representing all others who have the same interest in the outcome of the proceeding.[1] A class action therefore has the result of determining the issue for all those who have the same interest, whether they were a party to the action or not.

In most jurisdictions in Canada, the rules of court which govern class actions have changed little from those originally applied by the courts of equity. The usual requirement is that numerous persons must have the same interest before the courts will allow one or more to sue on behalf of the others.

A House of Lords decision around the turn of this century illustrates how narrowly the word "same" has been interpreted in Canada and England:

> The proper domain of a representative action is where there are like rights against a common fund or where a class of people have a community of interest in some subject matter[2]

Class actions in this country have therefore typically involved investors interested in a common fund or the enforcement of claims in contract or tort against the members of a voluntary association such as a club or unincorporated society or trade union.[3] Despite the rise of mass movements such as consumerism and environmentalism, Canadian courts have been reluctant to expand the situations in which they will allow a class action to be brought.

The recent Supreme Court of Canada decision in Naken v. General Motors Inc.[4] illustrates the difficulty in using class actions to remedy consumer complaints. In that case, four owners of Firenza cars brought an action against GM on behalf of all Ontario purchasers of 1971 and 1972 Firenzas. The plaintiffs claimed $1000 in damages for each owner, on the basis that the cars were not "durable, tough and reliable", as guaranteed by General Motors.

This action was commenced in 1973 and was appealed all the way up to the Supreme Court of Canada solely on the question of whether a class action could be brought in this situation. After almost 10 years of litigation and considerable expense, the Supreme Court ruled last year that a class action was not appropriate in the circumstances as it could not be shown that each owner had the same contractual relationship with GM.

The likely result of the Naken case will be to ensure that class actions are rarely brought in Canada unless laws governing their use are changed. Support for such changes clearly exist, not only with law reform commissions, but also from within the court system. For example, the Ontario Court of Appeal, in its decision in Naken (which allowed the class action to proceed in a modified form), stated that:

> In these days of mass merchandizing of consumer goods, accompanied as it often is by widespread or national advertising, large numbers of persons are almost inevitably going to find themselves in approximately the same situation if the article in question has a defect that turns up when the article is put to use...It is not practical for any one purchaser to sue a huge manufacturer for his individual damages, but the sum of the damages suffered by each consumer may be very large indeed.

> In such cases it would clearly be both convenient and in the public interest if some mechanism or procedure existed whereby the purchasers could sue as a class, with appropriate safeguards for defendents.[5]

One of the few successful public interest class actions in Canada was *Chastain* v. *B.C. Hydro and Power Authority*[6], which was commenced by the Vancouver Community Legal Assistance Society on behalf of those persons required to pay a deposit by B.C. Hydro to obtain electricity. As only those who were considered to be poor security risks were affected, the action was brought to obtain a declaration that B.C. Hydro had no authorization under its enabling statute to take such measures.

The court held that the plaintiff did represent a class of people having the same interest (despite the fact that the deposits were different) and that the action could properly be brought in the representative form. In this case, the court appears to be influenced by the fact that it could make a ruling on the legislation in question without having to consider the individual circumstances surrounding the requirement for each deposit.

In summary, a class action in Canada will only succeed if the court is convinced that the relationship between every member of the class and the defendent is identical and that the relief requested can be granted without considering the merits of each individual case. Public advocates will therefore be reluctant to use this tool except in the rare situations such as the *Chastain* case where the facts fall within the narrow guidelines applied by the courts.

It should be noted that Quebec changed its Code of Civil Procedure in 1977 to specifically permit class actions and that more than 50 were commenced in the two years following this change.

As is obvious from the above analysis, the largest impediment to class actions in Canada is the requirement that each member of the class have the same interest. In 1966, the United States altered its Federal Rules of Civil Procedure to allow class actions to be more easily brought. In particular, it was only required that a plaintiff have a claim which was *typical* of rather than the same as every member of the class.

Only a few states have allowed consumers to sue for deceptive advertising and other kinds of consumer fraud or enacted effective class action provisions. Citizens cannot bring class actions in federal court for violations of state laws unless each member of the class claims damages of $10,000 or more.[7]

Nevertheless, the change in the rules has resulted in a large increase in the number of class actions in the U.S. For example, in 1972, there were 3,148 out of 101,032 civil cases pending in Federal Court that could be considered to be representative actions (2/5 of which were concerned with civil rights).[8] Another source documents that in one Federal District alone, more than 1300 class actions had been commenced to the end of 1971. Typical plaintiffs included:

- all subscribers of business telephones in New York County
- all Mastercharge credit card holders similarly situated
- all homeowners in the U.S.[9]

Problems with the American system of class actions have also been documented. For example, one difficulty is that the courts generally require that all members of a class receive notice of the action, before it can proceed. This may involve considerable time and expense for the plaintiff. However, as is clear from the number and scope of these actions in U.S. courts, a change in the rules in our courts would likely result in a significant increase in the use of class suits by public interest advocates in Canada.

B. Test cases

In general, a test case is used where there are a number of plaintiffs who have the same or similar actions against one or more defendants. By agreement of the parties, only one of the actions will proceed to trial, with the result that the court's decision will have implications for all other plaintiffs (depending on the agreement reached).

The test case approach has been used by public interest advocates to test the validity of legislation, to challenge an administrative decision or to cause manufacturers to alter the products they produce.

Test cases have been used in the United States for more than four decades. As early as the 1930's, the National Association for the Advancement of Colored People used a series of test litigation to impugn legislation establishing segregation in schools and public facilities.[10] This technique was successful because of the rights enshrined in the American constitution and the courts' willingness to defend those rights.

By contrast, test cases have been used relatively infrequently by Canadian public interest organizations. One explanation is that, in the absence of a Charter of Rights, the only effective means to challenge legislation was through jurisdictional arguments based on the division of powers given to the federal and provincial governments under the BNA Act. This approach does not deal directly with the concerns of those bringing the test action and means that the policy reasons for attacking the legislation may never actually be raised in the courtroom.

A recent example is the B.C. Civil Liberties Association's challenge to the provincial Heroin Treatment Act. This legislation was introduced in 1979 to mandate compulsory treatment of heroin addicts. The BCCLA arranged for legal counsel to act for a man being treated under this legislation. It was successfully argued in B.C. Supreme Court that the province was infringing on the federal government's exclusive jurisdiction in criminal matters and the Act was strucck down. On appeal to the Supreme Court of Canada, the legislation was eventually upheld; however, as a result of the controversy created by the test case, the provincial government ultimately decided not to implement the treatment programme.

Test litigation against the private sector is also infrequently employed in Canada. The evaluation of the Farmworkers Legal Services of B.C. Project which was recently completed, describes the Project's use of this tactic and the limitations which were found:

> A ... major test case recently initiated by the project involves a suit against one of the largest manufacturers of farm equipment, Massey Ferguson, for neglignece in the design of their 1964 model tractors. One of the tractors, built with a very high centre of gravity and no roll-bar protection, flipped over on top of a farmworker and crushed him causing multiple injuries to his bowel, spleen and lower limbs. The ase is problematic, hinging on whether Massey Ferguson should have foreseen the possible danger given 700-900 tractor deaths annually in North America, mostly due to this specific problem.
>
> The Massey Ferguson case is a good example of problems in the test case approach to law reform. The case is difficult and yet will require a huge expenditure of energy to follow it through to a decision. Moreover, all the test cases cited are indicative of the one major problem of this approach to law reform. Not one of the cases is yet resolved before the courts. For a given energy expenditure, test cases seem to be the most inefficient method of achieving change.[11]

C. Judicial review

Many public policy decisions in Canada are now made by administrative tribunals. Public interest advocates have increasingly used these forums to promote the interests of their constituents, presenting arguments on such matters as communications, energy development, environmental impacts, etc.

As the involvement of public interest organizations in the regulatory process has become more sophisticated over the last decade, they have frequently turned to the courts to ensure that administrative hearings are conducted fairly. The courts, in turn, have expanded the situations in which judicial review will be available. In general, the courts must be convinced that someone's rights will be affected by the decision of the tribunal and that one or more of the following has occurred:

- a fair hearing has been denied. For example, not enough notice was provided or secret meetings were held between the proponent and the tribunal
- a member of the board or tribunal is biased
- the tribunal has exceeded its jurisdiction

If the application is successful, the courts will usually suggest ways in which the errors of the tribunal can be corrected. However, most judges are unwilling to substitute their opinion for that of the administrative body and the issue is usually sent back to the board for its reconsideration. As a result, public interest interveners are rarely able to accomplish more than an improvement in regulatory process by using judicial review.

This limitation with judicial review is apparent from the following example. Recently, organizations on Vancouver Island including local environmental groups and municipalities had a decision of the provincial Environmental Appeal Board reviewed in B.C. Supreme Court. At the commencement of an appeal against the granting of a pesticide permit, the Board had announced that it intended to extend the permit for a full year if the appeal were denied. The appellants argued that they should be granted an adjournment to prepare evidence on the proposed extension of the permit into new seasons. This request was denied by the Board and the permit was eventually extended until the following year. On judicial review, the court agreed that the appellants should be granted time to prepare their case and ordered a rehearing. A further hearing was held by the Board; however, the decision at the end of the second hearing was no different than the one originally arrived at.

In the United States, judicial review was necessary for public interest organizations to gain access to the regulatory process. Until the mid-60's, administrative agencies were unwilling to grant standing to anyone who could not show that his/her interests were directly affected. In a landmark decision in 1965, the Second Circuit Court of Appeals ruled that an environmental preservation group, the Scenic Hudson Preservation Conference had standing to intervene in hearings to consider the siting of a proposed power generating station on Storm King Mountain in New York State. As a result, the rules regarding standing in admininistrative hearings in the United States are virtually the same as those in Canada; that is, anyone wishing to participate is allowed to do so.

D. Amicus curiae

Amicus curiae or literally "friend of the court" developed in the common law as a technique used by the courts to obtain information that couldn't be supplied by any of the parties to an action but which was important to arrive at a determination of the issues. In these situations, counsel for those not directly involved with the action were given special status as amicus curiae.

Public interest groups in Canada and the U.S. have used the amicus status to present policy arguments to the court where it was not possible to appear as one of the parties. For example, the American Civil Liberties Union has been associated with important constitutional decisions for more than 50 years. In the majority of these cases, the Union appeared as amicus rather than as a party to the proceeding.[12]

In Canada, the Supreme Court of Canada has granted intervenor status to organizations presenting policy arguments for almost a decade, beginning with the Morgenthaler case[13] in 1976. With the creation of the Charter of Rights, the courts are now being presented with public policy arguments on a regular basis.

However, a recent decision by the Saskatchewan Court of Queen's Bench in the Borowski case[14] suggests that the court may restrict the situations in which they will allow counsel to appear as amicus. In that case, both the Campaign Life Canada and the Canadian Civil Liberties Association applied for amicus status. The Court denied both applications, the former because it was advocating a partisan position and the latter because its position could be adequately represented at subsequent appeals.

In making these rulings, the Court relied on old precedents regarding the status of amicus, which have little relevance to the more recent practice of presenting policy arguments in this capacity. If, in future, the courts are not willing to look these early decisions in assessing interventions as amicus, the presentation of policy arguments from a variety of viewpoints may be severely restricted.

E. Private prosecutions

The offence provisions under the Criminal Code and various statutes are normally prosecuted by crown counsel employed by the federal or provincial governments. In the last couple of years, citizen groups, which have been dissatisfied with enforcement carried out by government agencies, have laid informations on their own and hired lawyers to conduct the prosecutions. Because the Crown is not involved in any manner, these are known as private prosecutions.

In particular, this technique has been used by groups with environmental concerns. The following are three examples of recent prosecutions:

- North Vancouver Municipal Refuse Site: Residents of North Vancouver who lived around a municipal garbage site had repeatedly petitioned the city's municipal council to operate the site in a more sanitary manner. After the city failed to respond to these requests, the municipality as well as several city officials were prosecuted by the citizens under the provincial Pollution Control Act. (Legal counsel was provided by the West Coast Environmental Law Association).As a result, the municipality was placed on probation for 6 months, during which time it had to properly maintain the site.

- Cyanimid of Canada: This company was prosecuted by the Canadian Environmental Law Association under the Federal Fisheries Act. Because Cyanimid could show that it was working with provincial authorities to reduce the pollutants it was placing in a stream, the company was found guilty but only fined $1.

- Crown Zellerbach: The Fraser River Coalition, a group formed to protect the natural resources of the Fraser River in B.C., prosecuted Crown Zellerbach for allowing pollutants to seep into the river. The prosecution was successful and the company was fined $26,000. Because the Fisheries Act allows a private informant to collect half of any fine levied, the Fraser River Coaltion was entitled to $13,000, which it set aside for its advocacy work. The prosecution also prompted the provincial government to set up a task force specifically mandated to bring polluters along the Fraser River to court.

The high-profile nature of these cases will likely result in increased use of this approach in future. The only drawbacks with private prosecutions are that they can only be used with summary offences and that the Crown can take over the prosecution at any time and enter a stay of proceedings.

FOOTNOTES TO APPENDIX I

1. Ralph C. Deans, Class Action Lawsuits, Editorial Research Reports, Washington, D.C., 1973, at 17

2. Markt & Co. v. Knight Steamship Co. Ltd, [1910] 2 K.B. 1021

3. Neil J. Williams, Consumer Class Actions in Canada, for Consumers Association of Canada, 1974, at 14

4. Naken v. General Motors of Canada Inc., 144 D.L.R. (3rd) at 385

5. 92 D.L.R. (3rd) 100 at 104

6. (1973) 32 D.L.R. (3rd) at 443

7. B. C. Moore and F. R. Harris, "Class Actions: Let the People In", in Verdicts on Lawyers, Ralph Nader and Mark Green, ed., N.Y. 1976, 172 at 177

8. Ralph C. Deans, supra, note 1, at 10 et seq. and Report of the Special Committee of American College of Trial Lawyers, 1972, at 13

9. Council for Public Interest Law, Balancing the Scales of Justice/ Financing Public Interest Law in America, 1976 at 34

10. Leo McGrady, Reseach Coordinator, Farmworkers Legal Services of B.C./Project Evaluation for the Department of Justice, 1983 at 110

11. Robert L. Rabin, "Lawyers for Social Change: Perspectives on Public Interest Law", (1976) 28 Stanford L. Rev. 207 at 211 et seq.

12. (1976) 1 S.C.R. 616

13. Unreported, Saskatchewan Q.B., February 24, 1983

14. Analysis of the Borowski decision in the July/August, 1983 edition of the National